No. 11799

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Appellant,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a corporation, R. H. McKEON, individually, GEORGE B. PAGE, individually, R. H. McKEON and G. B. PAGE, doing business under the fictitious name of Pacific Laundry and Dry Cleaners; GEORGE B. PAGE, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company; FLOYD GILBERT, ROBERT ECHOLS and BEVERLY ECHOLS,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States for the Southern District of California

Central Division

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

HARRY E. SACKETT

RAYMOND G. BROWN

810 South Spring Street

Los Angeles 14, Calif.

For Appellee Ohio Casualty Insurance Company:

PARKER, STANBURY & REESE

707 South Hill Street

Los Angeles 14, Calif.

For Appellees Robert Echols et al.:

A. H. BRAZIL

San Luis Obispo, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the United States District Court for the
Southern District of California
Central Division

Civil No. 6024-WM

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a corporation, R. H. McKEON, individually; GEORGE B. PAGE, individually; R. H. McKEON and G. B. PAGE, doing business under the fictitious name of PACIFIC LAUNDRY AND DRY CLEANERS; GEORGE B. PAGE, individually and doing business under the fictitious name of MISSION LINEN AND TOWEL SUPPLY COMPANY; FLOYD GILBERT; ROBERT ECHOLS and BEVERLY ECHOLS,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff complains and alleges:

I.

That this is a civil action for a declaratory judgment, brought under the provisions of Section 274-d of the Judicial Code, as amended. 28 U. S. C. A. 400.

II.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, for the purpose, among other things, of

engaging in the business of insuring persons against the liability imposed upon them for damages arising out of the ownership, maintenance [2] and use of motor vehicles. That plaintiff is duly admitted and licensed to transact such business in the State of California and is a citizen of the State of Washington, having its Home Office and principal place of business in Tacoma, in said State.

III.

That defendant, The Ohio Casualty Insurance Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio for the purpose, among other things, of engaging in the business of insuring persons against liability imposed upon them by law for damages arising out of the ownership, maintenance and use of motor vehicles and is a citizen of the State of Ohio, maintaining its Home Office and principal place of business in the City of Hamilton, in said State.

IV.

That the defendants, R. H. McKeon, George B. Page, sometimes known as G. B. Page, Floyd Gilbert, Robert Echols and Beverly Echols are natural citizens of the State of California, residing within the Southern District of the United States District Court for the State of California.

V.

That there is a diversity of citizenship among and between plaintiff and each and all of said defendants, and that the amount in controversy herein exceeds the amount of $3,000.00, exclusive of interest and costs.

VI.

That the defendant, George B. Page, also known as G. B. Page, engages in various business enterprises, sometimes as an individual and at other times as a co-partner under fictitious names, two of which said enterprises are Mission Linen and Towel Supply Company and Pacific Laundry and Dry Cleaners. That the defendants, George B. Page, sometimes known as G. B. Page and R. H. McKeon are co-partners in the conduct of the business enterprise known and conducted under the fictitious name of Pacific Laundry and Dry Cleaners.

VII.

That on or about the 18th day of September, 1945, in consideration of the premium paid, plaintiff issued to the defendant, George B. Page, [3] individually and doing business as Mission Linen and Towel Supply Company and H. B. Page, individually and doing business as Model Linen Supply Company and George B. Page, doing business as Modern Linen Supply Company, hereinafter designated as the "insured", and effective for a term of one year from and after said date, its policy of automobile liability and property damage insurance, Number CLP 11184, covering a certain 1940 G.M.C. Panel Truck, Motor Number 22837053. That said policy was issued by plaintiff and accepted by said insured in consideration of the statements contained in the Declarations forming a part thereof and subject to the limits of liability, exclusions, conditions, and agreements therein contained. That a copy of said policy is attached hereto, marked "Exhibit A", and by this reference made a part hereof, the same as if fully restated herein.

VIII.

That said policy of insurance provided that plaintiff would pay on behalf of said insured all sums which said insured might be obligated to pay by reason of the liability imposed upon said insured by law for damages, caused by bodily injuries and damage to property of others, including death at any time resulting therefrom, sustained by any person or persons caused by accident and arising out of the ownership, maintenance and use of said motor vehicle. That plaintiff further agreed in and by said policy with said insured to provide a defense of any suit or suits brought against said insured alleging such injuries and seeking damages by reason thereof. That the limits of liability contained in said policy of insurance were $10,000.00 as applicable to injury or death of one person, and subject to that limit for each person, the sum of $25,000.00 for each accident giving rise to claims or suits against said insured and the sum of $5,000.00 for damage to property of other persons. That said policy of insurance was in full force and effect at all times hereinafter mentioned.

IX.

That said policy of insurance contained, among other things, the following provision:

> "Other Insurance—If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is [4] in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and

above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy. It is further provided that in respect of loss arising out of the operation, maintenance or use of any non-owned automobile other than a hired automobile, the applicable insurance afforded by this policy shall be excess over and above such other available insurance. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured."

X.

That sometime prior to the 16th day of January, 1946, the exact day being unknown to plaintiff, the defendant, The Ohio Casualty Insurance Company, in consideration of a premium duly paid, issued to the defendants, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, hereinafter designated as "said assured", its policy of automobile liability and property damage insurance, numbered CLP 2454.In and by the terms of said policy of insurance, the defendant, The Ohio Casualty Insurance Company agreed to and did indemnify said assured against the liability imposed by law for damages arising out of bodily injuries, including death at any time resulting therefrom, caused by accident and arising out of the operation, maintenance and use of motor vehicles. Said defendant further agreed in and by the terms of said policy of insurance, to provide a defense of any suit or suits brought against said assured alleging such injuries and seeking damages on account thereof. The limits of

liability contained in said policy of insurance were $25,000.00 as applicable to injury or death of one person, and subject to that limit for each person, the sum of $50,000.00 for each accident giving rise to claims or suits against said assured and the sum of $5,000.00 for damage to the property of others. That said policy of insurance was in full force and effect at all times hereinafter mentioned.

XI.

That said policy of insurance so issued by defendant, The Ohio Casualty Insurance Company, contains, among other things, the following provision:

"DEFINITIONS" [5]

"(1) * * *

(2) If the Named Assured is a corporation or a co-partnership the word "Assured" wherever used in this policy shall include executive officers, directors or co-partners respectively, in their capacity as such."

XII.

That sometime immediately prior to the 16th day of January, 1946, the defendant, George B. Page, individually, and doing business under the fictitious name of Mission Linen and Towel Supply Company, leased or rented the motor vehicle hereinabove, and in said policy of insurance described and issued by plaintiff, to R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners for their use in the conduct of the business of said last named partnership enterprise. That on or about the 16th day of January, 1946, the defendant, Floyd Gilbert was driving and operating said motor vehicle on and about the

business of R. H. McKeon, and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners and while so engaged in the business of said defendants, became involved in an accident resulting in personal injuries of a serious nature to the defendants, Robert Echols and Beverly Echols and in damage to the property of the defendant, Robert Echols. That said last named defendants have made claim against plaintiff and against each and all of the other defendants named in this action. That said defendants, Robert Echols and Beverly Echols have brought an action for damages against the defendants, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners and G. B. Page, doing business individually under the fictitious name of Mission Linen and Towel Supply Company and Floyd Gilbert in the Superior Court of the State of California in and for the County of San Luis Obispo, said action being numbered 15733 on the dockets of said court; and demand has been made upon plaintiff by the defendants, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, to provide a defense to said action, and they have tendered the defense of said action to plaintiff. Said last named defendants contend that plaintiff is bound and obligated to provide a defense to said action, by and through its attorneys, and to pay any judgment recovered therein, up to [6] the limits of liability contained in its said policy of insurance.

XIII.

That an actual controversy exists among and between the plaintiff and each and all of the defendants. That

it is the position of plaintiff that its said policy of insurance, while in full force and effect, does not apply to and cover said accident of January 16, 1946, for the reason that said policy of insurance so issued by defendant, The Ohio Casualty Insurance Company, contains higher limits of liability and covers said accident to the exclusion of the policy issued by plaintiff. That the defendant, The Ohio Casualty Insurance Company contends that the liability of the plaintiff is primary, and that its liability, if any, is secondary, and that its policy of insurance applies only after the limits of liability stated in the policy of insurance issued by plaintiff have been exhausted.

That each and all of the individual defendants to this action claim plaintiff has primary liability by reason of said accident of January 16, 1946; that plaintiff is bound and obligated to provide a defense to said action for damages, numbered 15733 on the dockets of the Superior Court, San Luis Obispo County, California, and pay any judgment recovered therein up to the limits of liability contained in said policy.

That it is the further position of plaintiff that its policy of insurance, while in full force and effect, does not apply to and cover said accident of January 16, 1946, for the reason that said motor vehicle at the time of said accident was being used exclusively in the business of R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, and that the policy of insurance of defendant, The Ohio Casualty Insurance Company covers and applies to said accident to the exclusion of the policy issued by the plaintiff.

Wherefore, plaintiff prays:

(a) That the Court order a speedy hearing of this action and advance it on the calendar as provided in Rule 57, of the Rules of Civil Procedure of the District Courts of the United States;

(b) That upon final hearing hereof, this Court enter a [7] declaration that said policy of insurance so issued by plaintiff does not apply to and cover said accident of January 16, 1946; but that the policy of insurance issued by the defendant, The Ohio Casualty Insurance Company, applies to and covers said accident to the exclusion of the insurance afforded by plaintiff; that plaintiff is not bound or obligated to provide a defense to said action numbered 15733 now pending in the Superior Court of the State of California in and for said County of San Luis Obispo, and that plaintiff is not bound or obligated to pay any judgment recovered in said action by the defendants, Robert Echols and Beverly Echols, against the defendants, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners and George B. Page, doing business individually under the fictitious name of Mission Linen and Towel Supply Company and Floyd Gilbert; and

(c) For such other and further relief, both general and special, as to this Honorable Court may seem just, meet and proper.

HARRY E. SACKETT
Attorney for Plaintiff
RAYMOND G. BROWN
Attorney for Plaintiff

[Verified.] [8]

"EXHIBIT A"

Comprehensive Bodily Injury and Property Damage Liability Policy

Policy No. CLP 11184
Agent James McCloskey

[Crest]

UNITED PACIFIC INSURANCE COMPANY

Tacoma, Washington

DECLARATIONS

1. The named insured is George B. Page, Individually and DBA Mission Linen and Towel Supply Company and H. B. Page Individually and DBA Model Linen Supply Co., and George B. Page DBA Modern Linen Supply Company.
2. Post office address of insured 723 E. Montecito St., Santa Barbara, California.
3. The policy period shall be from September 18, 1944 to September 18, 1947 at 12:01 A. M. standard time at the insured's above designated post office address as to each of said dates.
4. Provisional deposit premium payable on effective date is $609.72, on first anniversary $609.72 and on second anniversary $609.72.
5. Policy is subject to Annual audit.
6. Named insured's principal business operations are Laundry, Linen & Towel Supply.

7.

	Description of Coverages	Coverages are "Included" or "Excluded"	Limits of Liability: Each Person	Each Occurrence	Aggregate
	Bodily Injuries Coverage:				
A	(1) Automobiles	Included	$10,000.	$25,000.	Not applicable
A	(2) Products	Included	$10,000.	$25,000.	$25,000.00
A	(3) All other exposures	Included	$10,000.	$25,000.	Not applicable
	Property Damage Coverages:				
B	Automobiles	Included	Not applicable	$ 5,000.	Not applicable
C	(1) Products	Excluded	Not applicable	$——	$——
C	(2) All other exposures	Excluded	Not applicable	$——	$—— operations, $—— protective, $—— contractual

8. Insured's records are kept and may be audited at above post office address or at No Exceptions.

9. No insurer has canceled or declined any bodily injury or property damage liability insurance for the named insured during the past year, except No Exceptions.

10. The premium for this policy is modified by reason of the insured's having in effect at inception date of this policy the following insurance:

Name of Insurance Carrier	Policy No.	Coverage Afforded	Limits of Liability	Expiring
None				

The terms printed on the back of this page and numbered 1 to 76 inclusive, are hereby made a part hereof, and this page, when countersigned by a duly authorized agent of the company, together with United Pacific Insurance Company page of terms numbered 77 to 172 inclusive shall constitute the above numbered policy.

UNITED PACIFIC INSURANCE COMPANY

J W Reynolds President.

Countersigned at Santa Barbara, Calif.

by.....

Authorized Agent. [9]

Specimen.

UNITED PACIFIC Insurance Company

Does Hereby Agree with the named insured, in consideration of the premium, subject to the limits of liability and other terms of this policy:

To Pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability for damages (1) imposed upon him by law or (2) assumed or retained by him under any warranty of goods or products, or under any contract or agreement wholly in writing which liability, without such contract or agreement, would not attach, Because Of—

Coverage A—Bodily Injury, Sickness or Disease, including Death at any time resulting therefrom, sustained by any person or persons:

Coverage B—Injury To or Destruction Of Property, including loss of use thereof, arising out of the ownership, maintenance or use of any Automobile;

Coverage C—Injury To or Destruction Of Property Of Others, including loss of use thereof, caused by accident and arising from exposures not described in Coverage B.

* * * * * * * * *

(4) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured, and also any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured.

* * * * * * * * *

Other Insurance—If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy. It is further provided that in respect of loss arising out of the operation, maintenance or use of any non-owned automobile other than a hired automobile, the applicable insurance afforded by this policy shall be excess over and above such other available insurance. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured.

* * * * * * * * *

[Endorsed]: Filed Nov. 26, 1946. Edmund L. Smith, Clerk. [10]

[Title of District Court and Cause]

SEPARATE ANSWER OF DEFENDANT THE OHIO CASUALTY INSURANCE COMPANY, A CORPORATION

Comes now the defendant, The Ohio Casualty Insurance Company, a corporation, and severing from its co-defendants and answering for itself alone affirms, denies and alleges, as follows:

I.

In answer to paragraphs VII, VIII and IX of plaintiff's complaint this defendant states that it lacks sufficient information, knowledge or belief to enable it to answer and on that ground denies each and every allegation contained in the said paragraphs and each and every part of each thereof. It is informed and believes and therefore alleges that an insurance policy was issued by the plaintiff Company to George B. Page, a defendant herein, individually and doing business as the Mission Linen and Towel Supply Company covering a certain 1940 GMC panel truck, motor number 2283705 and that said policy of insurance covered the said George B. Page [11] individually and doing business as the Mission Linen and Towel Supply Company and the said 1940 GMC panel truck on the day of January 16, 1946 at the time of an accident in which the said motor vehicle was involved. That said policy of insurance provided that the plaintiff would pay on behalf of the said insured all sums which said insured might be obligated to pay by reason of liability imposed upon said insured by law for damages caused by bodily injuries and damage to property of others including death at any time resulting therefrom

sustained by any person or persons caused by an accident arising out of the ownership, maintenance or use of said motor vehicle. That plaintiff further agreed in and by said policy with said insured to provide a defense of any suit or suits brought against said insured alleging such injuries and seeking damages by reason thereof.

II.

In answer to paragraph X of plaintiff's complaint this defendant admits that on or about the 24th day of March, 1945 this defendant in consideration of a premium duly paid, issued to defendant R. H. McKeon and G. B. Page, doing business as Pacific Laundry and Dry Cleaners its policy of comprehensive bodily injury, liability and property damage CLP 2454. Denies each and every other allegation contained therein except that it admits that the limits of liability contained in said policy of insurance were $25,000.00 as applicable to the death or injury of one person and subject to that limit for each person the sum of $50,000.00 for each accident giving rise to claims or suits against said insured or coming under the terms of said policy and the sum of $5000.00 for damage to the property of others for losses coming under the terms of said policy of insurance. That said policy of insurance was in full force and effect on the 16th day of January, 1946 and in that connection defendant alleges that under the terms of said policy it agreed to pay on behalf of the insured all sums which the insured should become obligated to pay [12] by reason of the liability imposed upon him by law because of bodily injury, disease or illness including death at any time resulting therefrom sustained or alleged to have been sustained within the policy period by any person or persons. Under the terms

of said policy it was extended with respect to automobiles owned by or registered in the name of the named insured and said policy of insurance contained the following provisions:

> "Other Insurance.—If other valid insurance or indemnity exists protecting the Assured or any person or organization entitled to protection hereunder from liability for bodily injury, disease, illness or death, or for damage to property of others, this policy shall not apply in respect to such specific hazard otherwise covered, whether the Assured is specifically named in such policy or not; provided, however, that if the limits of insurance in this policy are in excess of the limits provided by said other insurance this policy shall provide excess insurance against said hazard in an amount sufficient to give the Assured a combined amount of protection equal to the limits of this policy."

That further it is provided by general endorsement Number (3) attached to said policy, dated March 24, 1945 as follows:

> "It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; of his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation."

That a copy of said policy including all endorsements thereon is attached hereto and incorporated herein as if fully set forth and denominated Exhibit "A".

III.

In answer to paragraphs XI and XII of plaintiff's [13] complaint this defendant admits the allegations therein contained.

IV.

In answer to paragraph XIII of plaintiff's complaint this defendant admits that each and all of the individual defendants to this action claim plaintiff has primary liability by reason of said accident of January 16th. That plaintiff is bound and obligated to provide a defense to action number 15733 on the docket of the Superior Court of San Luis Obispo County, California, and to pay any judgment recovered therein up to the limits of said policy.

This defendant, The Ohio Casualty Insurance Company, admits that it contends that the liability of the plaintiff is primary and that its liability, if any, is secondary and that its policy of insurance applies only after the limits of liability stated in the policy of insurance issued by the plaintiff have been exhausted. States that it lacks sufficient information or belief to deny each and every other allegation contained in the said paragraph and each and every part of each thereof.

Wherefore, this defendant prays that upon a hearing of this matter this court enter a declaration that said policy of insurance issued by the plaintiff does apply to and cover said accident of January 16, 1946. That the policy of insurance issued by this defendant does not apply to and cover said accident of January 16, 1946 and

any liability arising therefrom on the part of R. H. McKeon and G. B. Page, doing business as Pacific Laundry and Dry Cleaners, or anyone else until the limits of plaintiff's contract are reached and then only as to the liability of the defendant R. H. McKeon and G. B. Page, doing business as Pacific Laundry and Dry Cleaners, after the limits of liability of plaintiff United Pacific Insurance Company have been reached. That the court further decrees that the plaintiff is bound and obligated to provide a defense to said action number 15733 now pending in the Superior Court, State of California, in and [14] for said County of San Luis Obispo and is bound and obligated to pay any judgment recovered in said action by the defendants herein Robert Echols and Beverly Echols against the defendant R. H. McKeon and G. S. Page, doing business as Pacific Laundry and Dry Cleaners, and George B. Page, doing business individually under the fictitious name of Mission Towel Supply Company and Floyd Gilbert to the limit of its contract and for such other and further relief both general and specific as to this Honorable Court may seem just, meet and proper.

PARKER, STANBURY & REESE
By Richard E. Reese
Attorneys for Defendant, The Ohio Casualty Insurance Company, a Corporation

[Verified.] [15]

"EXHIBIT A"

CLP 2454 Comprehensive Liability Policy
(Including Property Damage for Automobiles)

THE OHIO CASUALTY INSURANCE COMPANY
of Hamilton, Ohio
(A Stock Company)

See End

Item Declarations

1. Name of Assured R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners
2. Post Office Address 110 State Street, Santa Barbara, California
3. The Assured is Co-partnership
(Individual, Co-Partnership, Corporation)
4. Policy Period: From March 24, 1945 to March 24, 1946 commencing and ending at 12:01 A. M. Standard Time at the address of the Named Assured as stated herein.
5. Limits of Liability: $25,000.00 each person;
$50,000.00 each occurrence.
$ 5,000.00 Automobile Property Damage Liability
6. Nature of Assured's business: Laundry and dry cleaning
7. The provisional deposit premium is $285.19 payable $285.19 in advance and $..... on 1st anniversary, $..... on 2nd annivery, subject to the provisions of Conditions 5 and 6 of this Policy. The sums of the Minimum Premiums referred to in Conditions 5 and 6 of this Policy shall in no event be considered as less than $100.00.

8. No liability insurance has been declined or cancelled by any company during the past three years, except as follows: No exceptions

Countersigned

This 16 day of March 1945. By St. Clair Morton lmk
Agent

Santa Barbara, California [16]
at

Specimen

* * * * * * * * *

AUTOMOBILE EXTENDED COVERAGE

With respect to automobiles owned by or registered in the name of the Named Assured the unqualified word "Assured" wherever used in this policy includes not only the Named Assured but also any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured.

* * * * * * * * *

3. Subrogation In the event of any payment under this policy the Company shall be subrogated to all the Assured's rights of recovery therefor and the Assured shall execute all papers required and shall do everything that may be necessary to secure such rights.

4. Other Insurance If other valid insurance or indemnity exists protecting the Assured or any person or organization entitled to protection hereunder from liability for bodily injury, disease, illness or death, or for damage to property of others, this policy shall not apply in respect to

such specific hazard otherwise covered, whether the Assured is specifically named in such policy or not; provided, however, that if the limits of insurance in this policy are in excess of the limits provided by said other insurance this policy shall provide excess insurance against said hazard in an amount sufficient to give the Assured a combined amount of protection equal to the limits of this policy.

* * * * * * * * * [17]

#3

GENERAL ENDORSEMENT

It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the policy other than as above stated.

To be attached to and forming a part of Policy No. CLP 2454 issued to R. H. McKeon, Et Al by

THE OHIO CASUALTY INSURANCE CO.

Howard Slamkis

President

This endorsement effective March 24, 1945

..... Agent [18]

#4

GENERAL ENDORSEMENT

It is hereby provided that in the event of any material change in or cancellation of the within numbered policy, notice of such change or cancellation will be given to the Exchange Officer of Camp Cooke or Santa Barbara, California.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the policy other than as above stated.

To be attached to and forming a part of Policy No. CLP 2454 issued to R. H. McKeon, Et Al by

THE OHIO CASUALTY INSURANCE CO.

Howard Slamkis
President

This endorsement effective March 24, 1945
..... Agent [19]

CERTIFICATE OF INSURANCE

THE OHIO CASUALTY INSURANCE COMPANY
HAMILTON, OHIO

Issued to: Camp Cooke Post Exchange

Issued to: Camp Cooke Post Exchange

Camp Cooke		California
Street	City	State

The Ohio Casualty Insurance Company does hereby certify that the following described policy has been issued and is in force at this date.

Policy No. CLP-2454. Policy Period 3-24-45 to 3-24-46
Inception Expiration

Name of Insured R. H. McKeon and G. B. Page dba Pacific Laundry and Dry Cleaners, (and Fashion Cleaners) (and Mission Laundry & Cleaners)

Post Office Address 110 State St., Santa Barbara, Calif.
Street City State

Coverages and Limits of Liability

Bodily Injury Liability	$25,000.00	Each Person
	$50,000.00	Each Accident
Property Damage Liability	$ 5,000.00	Each Accident

Description of Risk: Coverage applies to all automobiles owned or operated by the insured, and in addition, miscellaneous Bodily Injury Liability exposures, on a Comprehensive Policy form basis.

The Ohio Casualty Insurance Company will not notify the party to whom this certificate is addressed in the event of any change in or the cancellation of the policy, unless this certificate has been modified to provide that such notice is necessary.

State any modification here:

Countersigned at: Santa Barbara, Calif. date 11/21/45

THE OHIO CASUALTY INSURANCE COMPANY

By.....

(Important: Copy of Any Certificate Issued Must Be Furnished to the Company)

[Endorsed]: Filed Dec. 16, 1946. Edmund L. Smith, Clerk. [20]

[Title of District Court and Cause]

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Harry E. Sackett, Raymond G. Brown, plaintiff's attorneys, whose address is 810 South Spring St., Los Angeles 14, California, an answer to the complaint which is herewithin served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court] EDMUND L. SMITH
Clerk of Court

By Edward F. Drew
Deputy Clerk.

Date: 11/26/46.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [21]

Southern District of California, ss.

I hereby certify and return, that on the 5 day of Dec., 1946 I received the within Summons and Complaint and that after diligent search, I am unable to find the within-named defendant Floyd Robert Gilbert within my district.

Former employers state he left for State of Washington, no forwarding address. Parole officer of St. Barbara may know. Unable to contact today.

ROBERT E. CLARK
United States Marshal
By T. R. Keefe
Deputy United States Marshal [22]

Received Nov. 27, 1946. United States Marshal, Criminal Dept. Los Angeles, Calif.

[Endorsed]: Filed Jan. 3, 1947. Edmund L. Smith, Clerk. [23]

[Title of District Court and Cause]

ANSWER OF DEFENDANTS, ROBERT ECHOLS AND BEVERLY ECHOLS

Comes now the Defendants, Robert Echols and Beverly Echols, and jointly and severally answer Plaintiff's Complaint for Declaratory Judgment, as follows:

I.

These Defendants, not having any exact knowledge, information or belief, as to the allegations contained in several of the paragraphs in Plaintiff's Complaint but believing the same to be true, including the allegation that certain adverse claims are made by, between and against each of said insurance companies, these Defendants do not contest the allegations of said Complaint except as hereinafter more particularly set forth.

II.

These Defendants allege that the trial of the case [24] referred to in Plaintiff's Complaint in the Superior Court of the State of California, in and for the County of San Luis Obispo, has been set down to be tried on the 28th day of January, 1947, before a jury and that these De-

fendants believe it is necessary and proper, if possible to do so, to secure an early trial and judgment in this case determining the rights of the parties hereto.

III.

These Defendants resist the contention that either the United Pacific Insurance Company, a corporation, or the Ohio Casualty Insurance Company, a corporation, are not liable under their respective policies.

Wherefore, these defendants jointly and severally pray that the Court order a speedy hearing of this action and advance it on the calendar as provided in Rule 57, of the Rules of Civil Procedure of the District Courts of the United States; that upon a final hearing, the Court enter a judgment declaring that the policies of insurance issued by the Plaintiff and the Ohio Casualty Insurance Company each apply to and cover the accident mentioned in Plaintiff's Complaint; for such other and further relief both general and specific as to this Honorable Court may seem just, meet and proper.

Dated: December 31st, 1946.

A. H. BRAZIL

Attorney for Defendants, Robert Echols and Beverly Echols [25]

[Verified.]

Received copy of the within Answer this 30th day of December, 1946. Parker & Stanbury JCH, Attorneys for .....

Received copy of the within Answer this 30th day of December, 1946. Harry E. Sackett, Attorney for Plaintiff.

[Endorsed]: Filed Feb. 8, 1947. Edmund L. Smith, Clerk. [26]

[LETTER DATED APRIL 16, 1947, to JUDGE MATHES FROM PARKER, STANBURY AND REESE]

PARKER, STANBURY & REESE
Attorneys at Law
Suite 1217 Foreman Building
707 South Hill Street
Los Angeles 14
MIchigan 1207

Harry D. Parker
Raymond G. Stanbury
White McGee, Jr.
Richard E. Reese
Van A. Hagenbaugh
John Henry Peckham

April 16, 1947

Honorable William C. Mathes, Judge
United States District Court
Southern District of California
Central Division
Federal Building
Los Angeles, California

Dear Judge Mathes:

Re: United Pacific Insurance Company, a corporation, v. The Ohio Casualty Insurance Company, a corporation
Civil No. 6024-WM

We have been advised by counsel for United Pacific Insurance Company, a corporation, that the above entitled matter has been set down ex parte for hearing before Your Honor on Friday, April 18, 1947, subject to our calendar and to the previous entry by us on behalf of our client, The Ohio Casualty Insurance Company, a cor-

poration, into a stipulation with counsel for the United Pacific Insurance Company, a corporation. We will not be ready for such a hearing in this matter on the date set. We have contacted our client with reference to the proposed stipulation and have been advised by them that we are not authorized to enter into such a stipulation, and they prefer that the matter proceed to a full hearing before Your Honor on the facts in the case.

We are writing this letter at the suggestion of your Clerk, Mr. Somers, to advise Your Honor of the situation. We advised counsel for the United Pacific Insurance Company yesterday upon first learning that the matter had been set for hearing, and are sending to them a copy of this letter.

Yours very truly,

PARKER, STANBURY & REESE

By Raymond G. Stanbury

RAYMOND G. STANBURY

RGS:PM

CC. Messrs. Harry E. Sackett and Raymond G. Brown

[Endorsed]: Filed Apr. 18, 1947. Edmund L. Smith, Clerk. [27]

[Title of District Court and Cause]

ORDER FOR PRE-TRIAL HEARING

Good cause appearing therefor from the proceedings heretofore had herein, upon the Court's own motion it is

Ordered:

(1) That this action be placed on calendar for pre-trial hearing in Court Room No. 2 of this Court at ten o'clock A. M. on May 26, 1947, pursuant to Rule 16 of the Federal Rules of Civil Procedure, and local rules 9, 10 and 11 of this Court; and, unless excused for good cause, each party appearing in the case shall be represented at such pre-trial hearing, and at the meeting or meetings held pursuant to (2) hereof, by the attorney who is to be in charge of the conduct of the trial on behalf of such party;

(2) The attorneys for the parties appearing in the case shall meet at a mutually convenient time and place, not less than ten days in advance of such hearing, and:

(a) exhibit to opposing counsel all documents (other than those to be used for impeachment) intended to be offered at the trial by each party represented;

(b) formulate a concise statement of the facts involved, as claimed by each party, and ascertain which facts are to be admitted by all or any of the parties

---

This case will not be called for setting on May 5, 1947, pursuant to local rule 3, but will be set for trial upon conclusion of the pre-trial hearing.

for the purposes of the trial and which facts the respective parties intended to litigate upon the trial; and [28]

(c) ascertain the position of the parties with respect to all other matters referred to in Rule 16 F. R. C. P., which any party desires to have the meeting consider;

(3) Not less than three days in advance of the pretrial hearing, the attorneys for the parties appearing in the case shall prepare, sign and file with the Clerk, in duplicate and in the form required by local rule 4, a stipulation setting forth:

(a) a concise statement of the facts involved, as claimed by each party, showing which facts will be admitted by all or any of the parties for the purposes of the suit and which facts each party intends to litigate upon the trial;

(b) a list of all documents exhibited by each party at the meeting or meetings held pursuant to (2) above, with a description of each document sufficient for identification and a statement of all admissions by and all issues between any of the parties as to the genuineness thereof, as to due execution thereof, and as to the truth of relevant matters of fact set forth therein;

(c) a brief statement of the position of the parties with respect to all other matters referred to in Rule

16 F. R. C. P., which any party deems applicable to the case; and

(d) any other stipulations or suggestions relative to the case which counsel may desire to incorporate for the assistance of the Court, including the estimate or estimates of counsel as to the probable duration of the trial;

(4) Counsel for each party shall, not less than five days in advance of the pre-trial hearing, serve and file with the Clerk, in duplicate and in the form required by local rule 4, a memorandum containing a brief statement of the points of law, and a citation of the authorities in support of each point, upon which such party intends to rely at the trial;

(5) At the pre-trial hearing each party shall present to the Court all documents (other than those to be used for impeachment) intended to be offered at the trial by such party; and the Court shall thereupon consider:

(a) all stipulations, statements and memoranda filed pursuant to (3) and (4) above; [29]

(b) all documents relied upon by the respective parties;

(c) all matters referred to in Rule 16 F. R. C. P. which may be applicable to the case;

(d) all proceedings then pending under local rule 3 or under Rules 12, 33-37 F. R. C. P.; and

(e) all other questions which may be presented relative to parties, process, pleading or proof, with a view to simplifying the issues and bringing about a just, speedy and inexpensive determination of the action;

(6) Upon completion of the pre-trial hearing, the Court shall set the case for trial and make such order or orders pursuant to Rule 16 F. R. C. P. as the circumstances and status of the case may require;

(7) The memoranda required pursuant to (4) above may be considered as compliance with local rule 12, unless counsel desire to serve and file supplemental memoranda prior to trial.*

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

Dated: April 26, 1947.

WM. C. MATHES

United States District Judge

*If trial is to be by jury, the provisions of local rules 13 and 14 shall be followed; and counsel desiring the Court to propound any special questions upon the voir dire examination of prospective jurors shall, not less than two days prior to the trial, serve on opposing counsel and file with the Clerk, in duplicate and in the form required by local rule 4, a request therefor.

[Endorsed]: Filed Apr. 28, 1947. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

STIPULATION OF FACTS AND ISSUES

It Is Stipulated between the plaintiff United Pacific Insurance Company and the defendants The Ohio Casualty Insurance Company, Robert Echols and Beverly Echols, through their respective counsel, as follows:

I.

The parties stipulate to the following facts (except where a dispute is noted):

1. (a) That the necessary jurisdictional facts exist in that the plaintiff United Pacific Insurance Company is a corporation organized and domiciled in the State of Washington; that the defendant The Ohio Casualty Insurance Company is a corporation organized and domiciled in the State of Ohio and that the individual defendants are natural persons and citizens of the State of California residing within the Southern District of the United [31] States District Court;

(b) That the amount in controversy exceeds $3,000.00, excluding interest and costs.

2. (a) That the accident out of which the present insurance coverage controversy arises occurred on January 16, 1946, when a truck owned by George B. Page dba Mission Linen and Towel Supply Company and registered to Mission Linen and Towel Supply Company, which was leased to R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners, and operated by one Floyd Gilbert, an employee of R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners, on business of the latter

and with the permission of the owner, struck a vehicle owned and operated by certain defendants herein, Robert Echols and Beverly Echols;

(b) On September 12, 1946, the said Robert Echols and Beverly Echols filed suit in the Superior Court of the State of California (San Luis Obispo) seeking damages from said accident from the following parties named as defendants: (1) R. H. McKeon and G. B. Page dba under the fictitious name of Pacific Laundry and Dry Cleaners, and (2) G. B. Page dba under the fictitious name of Mission Linen and Towel Supply and (3) Floyd Gilbert;

(c) For the purpose of this action it is stipulated that the said accident was proximately caused by negligence on the part of the said driver, Floyd Gilbert, which is imputed to the other defendants named in said action, and that the said Robert Echols and Beverly Echols are entitled to recover damages in excess of $3,000.00, exclusive of interest and costs, against any or all of the defendants named in their action. Floyd Gilbert has not been served with process in said action.

3. (a) That on September 18, 1944, the United Pacific Insurance Company issued its policy of automobile liability insurance as shown by Exhibit A attached hereto and that the same was in effect at all material times. That the named assureds therein are: [32]

George B. Paige individually and dba Mission Linen and Towel Supply Company,

H. B. Page individually and dba Model Linen Supply Co.,

George B. Page dba Modern Linen Supply Company;

(b) That the limits of said policy are $10,000.00 for injury to or death of one person and, subject to that limit for each person, $25,000.00 for any one occurrence.

4. (a) That on March 24, 1945, the Ohio Casualty Insurance Company issued its policy of automobile liability insurance as attached hereto (Exhibit B) and that the same was effective at all material times. That the named assureds therein are:

R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners, 110 State Street, Santa Barbara, California;

R. H. McKeon and G. B. Page dba Fashion Cleaners, 1041 Sierra Highway, Lancaster, California;

R. H. McKeon and G. B. Page dba Mission Laundry & Cleaners, 222-224 N. Monterey Street, Gilroy, California;

(b) That the said policy issued by The Ohio Casualty Insurance Company also provides, by endorsement effective at all material times, as follows:

"It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation."

(c) That the limits of said policy are $25,000.00 for injury to or death of one person and, subject to that limit for [33] one person, $50,000.00 for any one accident.

5. That George B. Page and G. B. Page referred to above are the same person. That the said Page, at all material times, conducted various enterprises sometimes as an individual and sometimes in partnership in various parts of California. That McKeon and Page in their various enterprises as named above were copartners. That Pacific Laundry & Dry Cleaners and Mission Linen and Towel Supply Company are not the same enterprises but are operated separately.

6. (a) That the policy issued by United Pacific Insurance Company provides coverage in addition to the named insureds to, inter alios, "(4) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured . . ." (Exhibit A, line 27 et seq., Definition "Insured" (4));

"Owned Automobile" is defined in said United Pacific Insurance Company policy as follows: "Owned Automobile means an automobile owned in full or in part or registered in the name of the named insured . . ." (Exhibit A, "Definitions", lines 48 to 49.)

(b) That the policy issued by the Ohio Casualty Insurance Company provides coverage, in addition to the named insureds to, inter alios, "with respect to automobiles owned by or registered in the name of the Named Assured . . . any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured." (Exhibit B, "Automobile Extended Coverage".)

The said Ohio Casualty Insurance Company policy further provides in the printed body thereof: "If the Named Assured is a corporation or a co-partnership, the word 'Assured' wherever used in this policy shall include executive officers, directors or co-partners respectively, in their capacities as such."

7. (a) It is stipulated that the driver Floyd Gilbert was [34] a person "using an owned or a hired automobile . . . with the permission of the named insured" within the meaning of the United Pacific Insurance Company policy and that Gilbert was thereby an insured of the United Pacific Insurance Company at the time and place of the accident subject to the limitations contained in the policy.

(b) The parties are unable to stipulate whether Gilbert was likewise an insured of The Ohio Casualty Insurance Company and this is a point in controversy for the Court to decide. (It is contended by the United Pacific Insurance Company that the accident vehicle, being owned by George B. Page, dba Mission Linen and Towel Supply Company, should be considered the same as if owned by or registered to R. H. McKeon and G. B. Page, dba Pacific Laundry & Dry Cleaners so that Gilbert qualified as a person driving a vehicle owned by The Ohio Casualty Insurance Company's named insured. It is contended by The Ohio Casualty Insurance Company that by the terms of its endorsement and within the meaning of the policy, R. H. McKeon and G. B. Page, dba Pacific Laundry & Dry Cleaners is not the same as George B. Page, dba Mission Linen and Towel Supply Company and therefore that Gilbert was not driving a car owned by or registered to the named assured.)

8. That each of said policies (Exhibits A and B) contain Other Insurance Clauses which are as follows:

The United Pacific Insurance Company policy provides as follows:

> "Other Insurance—If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy [35] shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy. It is further provided that in respect of loss arising out of the operation, maintenance or use of any non-owned automobile other than a hired automobile, the applicable insurance afforded by this policy shall be excess over and above such other available insurance. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured."

The Ohio Casualty Insurance Company policy provides as follows:

> "Other Insurance—If other valid insurance or indemnity exists protecting the Assured or any person or organization entitled to protection hereunder from liability for bodily injury, disease, illness or death, or for damage to property of others, this

policy shall not apply in respect to such specific hazard otherwise covered, whether the Assured is specifically named in such policy or not; provided, however, that if the limits of insurance in this policy are in excess of the limits provided by said other insurance this policy shall provide excess insurance against said hazard in an amount sufficient to give the Assured a combined amount of protection equal to the limits of this policy."

II.
ISSUES OF LAW

The issues of law in this proceding are as follows: [36]

(a) Does either of the policies of insurance apply to the exclusion of the other?

(b) Is there double insurance under both policies?

III.
CONTENTIONS OF THE PARTIES

The contentions of the plaintiff United Pacific Insurance Company are:

(1) That the substantive law of California applies in this proceeding and that George B. Page, also known as G. B. Page, was a named insured under both policies;

(2) That the accident vehicle was "owned by or registered in the name of the Named Assured" within the meaning of The Ohio Casualty Insurance Company policy and that therefore its policy of insurance covered and applied to said accident including the liability of the driver, Floyd Gilbert;

(3) That since the accident vehicle was being used at the time of the accident in the furtherance of the business of the insured named in The Ohio Casualty Insurance Company policy and by an employee of the insured named in said policy, then the policy of The Ohio Casualty Insurance Company applies to the exclusion of the policy issued by plaintiff;

(4) That should the Court overrule the foregoing points, then in the alternative plaintiff maintains that there is double or concurrent insurance covering the accident and that both companies are liable and should prorate the liability including the costs of defense of the action and damages in the State Court and the amount of any judgment or judgments therein in proportion to the limits of liability stated in the respective policies;

(5) That the total amount of insurance available for one person in the damage action is $35,000.00 because of each occurrence resulting in injuries or death, $10,000.00 of which is provided by [37] plaintiff and $25,000.00 of which is provided by The Ohio Casualty Insurance Company;

That therefore United Pacific Insurance Company is liable for 2/7 and the Ohio Casualty Insurance Company for 5/7 of any damages or loss because of injuries to or death of one person.

(b) Contentions of defendant The Ohio Casualty Insurance Company:

(1) That the substantive law of California applies in this proceeding in interpreting the insurance policies and that because of the endorsement of The Ohio Casualty Insurance Company policy excluding all activities of G. B.

Page which are not specified therein, G. B. Page as an individual and dba Mission Linen & Towel Supply Company, was not an assured thereunder, named or otherwise;

(2) That for the foregoing reasons the accident vehicle was not a vehicle "owned by or registered in the name of the Named Assured" (R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners) within the meaning of The Ohio Casualty Insurance Company policy and that the driver Floyd Gilbert was therefore not an assured under that policy.

(3) That since the policy of the United Pacific Insurance Company alone insures Floyd Gilbert, whose liability is primary and ultimate, the policy of the United Pacific Insurance Company applies to the exclusion of the other policy in this proceeding which is designed to avoid further litigation by subrogation, or otherwise; that if liability is imposed upon The Ohio Casualty Insurance Company it will be entitled to recoup its loss from Floyd Gilbert, an assured of the United Pacific Insurance Company, and therefore the liability would ultimately fall on that company.

(4) That if the above points are overruled, the two policies provide concurrent insurance until each of the insurers pays the lower limits, their excess insurance clauses being mutually eliminated and that The Ohio Casualty Insurance Company carries the [38] excess coverage until a total amount equal to its limits is paid.

(5) That the total insurance available is $25,000/$50,000 as the Ohio policy provides that in the event of other insurance it will provide the balance up to its stated limits.

(c) Contentions of Robert Echols and Beverly Echols:

(1) That they are entitled to compensation for the injuries sustained by them and to collect the same according to the judgment of this Court.

IV.
ESTIMATED TIME OF TRIAL

It is estimated that the action can be tried in one day.

HARRY E. SACKETT and
RAYMOND G. BROWN

Attorneys for Plaintiff United Pacific Insurance Company

PARKER, STANBURY & REESE
RAYMOND G. STANBURY

Attorneys for Defendant The Ohio Casualty Insurance Company

A. H. BRAZIL

By Harry E. Sackett

Attorney for Defendants Robert Echols and Beverly Echols [39]

EXHIBIT A

Comprehensive Bodily Injury and Property Damage Liability Policy

Policy No. CLP 11184
Agent James McCloskey

[Crest]

UNITED PACIFIC INSURANCE COMPANY

Tacoma, Washington

DECLARATIONS

1. The named insured is George B. Page, Individually and dba Mission Linen and Towel Supply Company and H. B. Page, Individually and dba Model Linen Supply Co., and George B. Page dba Modern Linen Supply Company.
2. Post office address of insured 723 E. Montecito St., Santa Barbara, California.
3. The policy period shall be from September 18, 1944 to September 18, 1947 at 12:01 A. M. standard time at the insured's above designated post office address as to each of said dates.
4. Provisional deposit premium payable on effective date is $609.72, on first anniversary $609.72 and on second anniversary $609.72.
5. Policy is subject to Annual audit.
6. Named insured's principal business operations are Laundry, Linen & Towel Supply.

7.

	Description of Coverages	Coverages are "Included" or "Excluded"	Limits of Liability: Each Person	Each Occurrence	Aggregate
Bodily Injuries Coverages:					
A	(1) Automobiles	Included	$10,000.	$25,000.	Not applicable
A	(2) Products	Included	$10,000.	$25,000.	$25,000.00
A	(3) All other exposures	Included	$10,000.	$25,000.	Not applicable
Property Damage Coverages:					
B	Automobiles	Included	Not applicable	$ 5,000.	Not applicable
C	(1) Products	Excluded	Not applicable	$——	$——
C	(2) All other exposures	Excluded	Not applicable	$——	$——operations, $——protective, $——contractual

8. Insured's records are kept and may be audited at above post post office address or at No Exceptions.

9. No insurer has canceled or declined any bodily injury or property damage liability insurance for the named insured during the past year, except No Exceptions.

10. The premium for this policy is modified by reason of the insured's having in effect at inception date of this policy the following insurance:

Name of Insurance Carrier	Policy No.	Coverage Afforded	Limits of Liability	Expiring
None				

The terms printed on the back of this page and numbered 1 to 76 inclusive, are hereby made a part hereof, and this page, when countersigned by a duly authorized agent of the company, together with United Pacific In-

surance Company page of terms numbered 77 to 172 inclusive shall constitute the above numbered policy.

UNITED PACIFIC INSURANCE COMPANY
J W Reynolds President.

Countersigned at Santa Barbara, Calif.
by James M. McCloskey
Authorized Agent. [40]

UNITED PACIFIC Insurance Company

Does Hereby Agree with the named insured, in consideration of the premium, subject to the limits of liability and other terms of this policy:

To Pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability for damages (1) imposed upon him by law or (2) assumed or retained by him under any warranty of goods or products, or under any contract or agreement wholly in writing which liability, without such contract or agreement, would not attach, Because Of—

Coverage A—Bodily Injury, Sickness or Disease, including Death at any time resulting therefrom, sustained by any person or persons;

Coverage B—Injury To or Destruction of Property, including loss of use thereof, arising out of the ownership, maintenance or use of any Automobile;

Coverage C—Injury To or Destruction Of Property Of Others, including loss of use thereof, caused by accident and arising from exposures not described in Coverage B.

* * * * * * * * *

(4) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured, and also any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured.

* * * * * * * * *

Other Insurance—If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy. It is further provided that in respect of loss arising out of the operation, maintenance or use of any non-owned automobile other than a hired automobile, the applicable insurance afforded by this policy shall be excess over and above such other available insurance. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured.

* * * * * * * * * [41]

EXHIBIT B

CLP No. 2454 Comprehensive Liability Policy
(Including Property Damage for Automobiles)

THE OHIO CASUALTY INSURANCE COMPANY
of Hamilton, Ohio
(A Stock Company)

Item Declarations

1. Name of Assured R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners
2. Post Office Address 110 State Street, Santa Barbara, California
3. The Assured is Co-partnership
(Individual, Co-Partnership, Corporation)
4. Policy Period: From March 24, 1945 to March 24, 1946 commencing and ending at 12:01 A. M. Standard Time at the address of the Named Assured as stated herein.
5. Limits of Liability: $25,000.00 each person;
$50,000.00 each occurrence.
$ 5,000.00 Automobile Property Damage Liability
6. Nature of Assured's business: Laundry and dry cleaning
7. The provisional deposit premium is $285.19 payable $285.19 in advance and $..... on 1st anniversary, $..... on 2nd anniversary, subject to the provisions of Conditions 5 and 6 of this Policy. The sums of the Minimum Premiums referred to in Conditions 5 and 6 of this Policy shall in no event be considered as less than $100.00.

8. No liability insurance has been declined or cancelled by any company during the past three years, except as follows: No exceptions

Countersigned

This 16 day of March 1945. By St. Clair Morton
Agent

Santa Barbara, California [48]
at

* * * * * * * * *

AUTOMOBILE EXTENDED COVERAGE

With respect to automobiles owned by or registered in the name of the Named Assured the unqualified word "Assured" wherever used in this policy includes not only the Named Assured but also any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured.

* * * * * * * * * [49]

3. Subrogation In the event of any payment under this policy the Company shall be subrogated to all the Assured's rights of recovery therefor and the Assured shall execute all papers required and shall do everything that may be necessary to secure such rights.

4. Other Insurance If other valid insurance or indemnity exists protecting the Assured or any person or organization entitled to protection hereunder from liability for bodily injury, disease, illness or death, or for damage to property of others, this policy shall not apply in respect to such specific hazard otherwise covered, whether the Assured is specifically named in such policy or not; provided, however, that if the limits of insurance in this

policy are in excess of the limits provided by said other insurance this policy shall provide excess insurance against said hazard in an amount sufficient to give the Assured a combined amount of protection equal to the limits of this policy.

* * * * * * * * * [50]

CERTIFICATE OF INSURANCE

THE OHIO CASUALTY INSURANCE COMPANY HAMILTON, OHIO

Issued to: Camp Cooke Post Exchange

Camp Cooke (Street) (City) California (State)

The Ohio Casualty Insurance Company does hereby certify that the following described policy has been issued and is in force at this date.

Policy No. CLP-2454 Policy Period 3-24-45 to 3-24-46
(Inception) (Expiration)

Issued to R. H. McKeon and G. B. Page dba Pacific Laundry and Dry Cleaners, (and Fashion Cleaners) (and Mission Laundry & Cleaners)

Post Office Address 110 State St., Santa Barbara, Calif.
(Street) (City) (State)

Coverages and Limits of Liability

Bodily Injury Liability	$25,000.00	Each Person
	$50,000.00	Each Accident
Property Damage Liability	$ 5,000.00	Each Accident

Description of Risk: Coverage applies to all automobiles owned or operated by the insured, and in addition, miscellaneous Bodily Injury Liability exposures, on a Comprehensive Policy form basis.

The Ohio Casualty Insurance Company will not notify the party to whom this certificate is addressed in the event of any change in or the cancellation of the policy, unless this certificate has been modified to provide that such notice is necessary.

State any modification here:

Countersigned at: Santa Barbara, Calif. date 11/21/45

THE OHIO CASUALTY INSURANCE COMPANY

By.....

(Important: Copy of Any Certificate Issued Must Be Furnished to the Company) [52]

#3

GENERAL ENDORSEMENT

It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the policy other than as above stated.

To be attached to and forming a part of Policy No. CLP 2454 issued to R. H. McKeon, et al. by

THE OHIO CASUALTY INSURANCE CO.
Howard Slamkis
President

This endorsement effective March 24, 1945
St. Clair Morton, Agent [56]

#4

GENERAL ENDORSEMENT

It is hereby provided that in the event of any material change in or cancellation of the within numbered policy, notice of such change or cancellation will be given to the Exchange Officer of Camp Cooke of Santa Barbara, California.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the policy other than as above stated.

To be attached to and forming a part of Policy No. CLP 2454 issued to R. H. McKeon, et al. by

THE OHIO CASUALTY INSURANCE CO.
Howard Slamkis
President

This endorsement effective March 24, 1945
St. Clair Morton, Agent

[Endorsed]: Filed May 23, 1947. Edmund L. Smith, Clerk. [57]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above action came on for trial in the above court before the Honorable William C. Mathes, judge presiding, on June 13, 1947, the plaintiff being represented by its attorneys Harry E. Sackett and Raymond G. Brown, the defendant The Ohio Casualty Insurance Company being represented by its attorneys Parker, Stanbury & Reese (Raymond G. Stanbury appearing), the defendants Robert Echols and Beverly Echols having appeared through their attorney A. H. Brazil, and having been legally notified of the time and place of trial but being voluntarily absent, and the other defendants not being present, the foregoing and named parties having filed their written stipulation as to the facts and issues, the plaintiff and the defendant The Ohio Casualty Insurance Company having further stipulated that the Court should determine their [60] respective rights and liabilities as to Floyd Gilbert and should decide whether plaintiff alone, or both of said parties, is or are obligated to provide indemnity for his tort involved herein, and the cause having been argued and continued to July 11, 1947, at which time the appearances of parties and counsel were the same as on June 13, 1947, save that attorney Raymond G. Brown did not appear, the parties having rested, and the Court being fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

The Court finds that it is true that the plaintiff is and at all times involved was a corporation organized and existing under the laws of the State of Washington and that it was at all times involved a resident of said state; that the defendant The Ohio Casualty Insurance Company at all times involved is and was a corporation organized and existing under the laws of the State of Ohio and a resident of said state; that each of said corporations was at all times involved lawfully engaged in the transaction of the insurance business; that each and all of the other persons named in the complaint and summons as defendants were at all times involved natural citizens, residents of the State of California, and residing within the Southern District of California.

II.

The Court finds that there is and at all times involved was a diversity of citizenship among and between the parties and between the plaintiff and each and all of the defendants and that the amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs; the Court finds that there is a dispute between the parties presenting a proper case for declaratory relief. [61]

III.

The Court finds that it is true that George B. Page named as a defendant, and also known as G. B. Page, was at all times involved herein engaged in various business enterprises, sometimes as an individual and sometimes as a co-partner under fictitious names, two of which enterprises were Mission Linen and Towel Supply

Company and Pacific Laundry & Dry Cleaners; the Court finds that it is true that the said George B. Page (sometimes known as G. B. Page) and R. H. McKeon were at all times involved herein co-partners in the conduct of a business enterprise known as Pacific Laundry & Dry Cleaners; that it is true that the said George B. Page at all times involved herein conducted a business individually under the fictitious name of Mission Linen and Towel Supply Company; that the said George B. Page at all times involved herein also did business as an individual under the fictitious name of Modern Linen Supply Company; that it is true that at all times involved herein the said R. H. McKeon and the said G. B. Page as co-partners conducted other business enterprises under the fictitious names of Fashion Cleaners and Mission Laundry and Cleaners; that it is true that the said George B. Page was at all times involved herein also engaged in other activities as an individual; that Pacific Laundry & Dry Cleaners and Mission Linen and Towel Supply Company are not and never have been the same enterprises but are and always have been operated separately.

IV.

The Court finds that it is true that on or about September 18, 1944, for a valuable consideration, plaintiff, United Pacific Insurance Company, issued to the said George B. Page, individually and doing business as Mission Linen and Towel Supply Company, and H. B. Page, individually and doing business as Model Linen Supply Company, and George B. Page, doing business as Modern Linen Supply Company, a policy of automobile liability insurance exactly as shown [62] in Exhibit A attached to the complaint which exhibit is incorporated

herein by reference, together with the endorsements attached thereto, and all of which the Court finds constitutes the contract of the said parties, insurer and insureds; that the said policy was in effect at all times herein involved.

V.

The Court finds that the aforesaid policy issued by plaintiff United Pacific Insurance Company provides coverage, in addition to the named insureds to, inter alios, "(4) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the named assured . . ."; the Court finds that "Owned Automobile" is defined in the said policy as follows: "Owned Automobile" means an automobile owned in full or in part or registered in the name of the named insured . . ."

VI.

The Court finds that it is true that the defendants The Ohio Casualty Insurance Company, on March 24, 1945, for a valuable consideration, issued a policy of automobile liability insurance to the said R. H. McKeon and G. B. Page, doing business under the following fictitious names: Pacific Laundry & Dry Cleaners, Fashion Cleaners, and Mission Laundry & Cleaners; that said policy was exactly as shown in Exhibit A attached to the answer of said defendant The Ohio Casualty Insurance Company, together with all endorsements attached thereto, which policy and endorsements are hereby incorporated by reference and found to constitute the contract of the parties; that said contract was in full force and effect at all times involved herein.

VII.

The Court finds that the said policy issued by the defendant The Ohio Casualty Insurance Company provided, by typed endorsement effective at all times involved herein, as follows: "It [63] is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships, a receiver, a director or an executive officer of a corporation." The Court finds that it was the intention of R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners, and of the defendant The Ohio Casualty Insurance Company, in procuring the aforesaid policy (Exhibit A of answer of said Company, incorporated herein by reference) to recognize the various partnerships of R. H. McKeon and G. B. Page insured by said policy, including the partnership conducted under the fictitious name of Pacific Laundry & Dry Cleaners as separate entities and to differentiate the activities of G. B. Page as a partner of R. H. McKeon in the enterprises named in said policy from the activities of the said G. B. Page (also known as George B. Page) individually or in connection with any unspecified activity, all in accordance with the endorsement set forth in this paragraph.

VIII.

The Court finds that the said policy of the defendant The Ohio Casualty Insurance Company also provides, and has at all times involved herein provided, coverage to the following persons, inter alios, in addition to the

named assureds: "with respect to automobiles owned by or registered in the name of the Named Assured . . . any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured."

IX.

The Court finds that it is true that prior to January 16, 1946, George B. Page, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company leased or [64] rented to R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry & Dry Cleaners for the use of the latter in the conduct of their business under such name, and for a valuable consideration, a certain truck referred to hereinafter as the truck.

X.

The Court finds that it is true that on January 16, 1946, the said truck was involved in a collision with a vehicle occupied by the defendants Robert Echols and Beverly Echols and that as a proximate result thereof the said Robert Echols and Beverly Echols sustained personal injuries and incurred losses in excess of $3,000.00 in value, exclusive of costs and interest.

XI.

The Court finds that it is true that at the time of said accident the said truck was being driven by one Floyd Gilbert named as a defendant herein; that the said Floyd Gilbert was acting as servant and employee of R. H. McKeon and G. B. Page doing business as Pacific Laundry & Dry Cleaners; that the said Floyd Gilbert was

acting in the scope of his said employment; that at said time the said truck was owned by George B. Page doing business as Mission Linen and Towel Supply Company; that the said Floyd Gilbert at the time of said accident operated the said truck with the knowledge, permission and consent of the owner thereof, George B. Page, doing business as Mission Linen and Towel Supply Company.

XII.

The Court finds that it is true that the said accident and all injuries, damages and losses incurred by the said Robert Echols and Beverly Echols and each of them were solely and proximately caused by negligence on the part of the said Floyd Gilbert in the operation of the said truck.

XIII.

The Court finds that it is true that on September 12, [65] 1946, the said Robert Echols and Beverly Echols filed suit in the Superior Court of the State of California in and for the County of San Luis Obispo seeking damages in excess of $3,000.00 exclusive of interest and costs, and arising from the aforesaid negligence and accident, from the following parties who were and are named as defendants in said action:

(1) R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners, and

(2) G. B. Page doing business under the fictitious name of Mission Linen and Towel Supply, and

(3) Floyd Gilbert;

that it is true that the said Robert Echols and Beverly Echols are entitled to recover damages in excess of

$3,000.00, exclusive of interest and costs, against the defendants named in (1) and (2) of this paragraph solely through the imputation to them of the negligence of Floyd Gilbert by operation of law.

XIV

The Court finds that the policy of insurance issued by the plaintiff United Pacific Insurance Company attaches to and covers the liability of George B. Page doing business as Mission Linen and Towel Supply and the liability of the said Floyd Gilbert in connection with the aforesaid accident and applies to and covers, up to the limits of said policy, among other things, all injuries, damages and losses sustained by Robert Echols and Beverly Echols and each of them; the Court finds that the policy of the defendant The Ohio Casualty Insurance Company attaches to and covers the liability of R. H. McKeon and G. B. Page doing business as Pacific Laundry & Dry Cleaners, and that it attaches to the liability of the last named parties to the said Robert Echols and Beverly Echols and each of them arising out of the said accident, up to the limits of said policy. [66]

XV.

The Court finds that the policy of the said defendant The Ohio Casualty Insurance Company does not cover or attach to the liability of the said Floyd Gilbert; that the said Floyd Gilbert at the time of said accident was not operating a vehicle owned by or registered in the name of any Named Assured or person insured in or by the said policy of the Ohio Casualty Insurance Company.

XVI.

The Court finds that the policy of the said defendant The Ohio Casualty Insurance Company does not cover or attach to the liability of George B. Page individually or doing business as Mission Linen and Towel Supply Company; that the truck involved in said accident was not a vehicle owned by or registered in the name of any Named Assured or person insured in or by the said policy of The Ohio Casualty Insurance Company.

XVII.

The Court finds that at the time of the aforesaid accident the said Floyd Gilbert was operating and using an automobile owned by George B. Page individually and doing business as Mission Linen and Towel Supply Company, a named assured under the aforesaid policy of the plaintiff United Pacific Insurance Company; that the said Floyd Gilbert was therefore an assured of the said United Pacific Insurance Company at the time of said accident within the meaning of the said insurance policy of said plaintiff.

XVIII.

The Court finds that at the time of the aforesaid accident R. H. McKeon and G. B. Page doing business as Pacific Laundry & Dry Cleaners were, through the aforesaid Floyd Gilbert and as his employers, persons legally responsible for the use of a vehicle owned by a named assured of the plaintiff United Pacific Insurance Company's policy, within the clause set forth in paragraph V of these findings, and with the permission of said named assured; the Court finds therefore that the said R. H. McKeon and G. B. Page [67] doing business as Pacific

Laundry & Dry Cleaners were at the time of said accident assureds under the policy of said plaintiff and covered and indemnified thereunder as well as under the policy of the defendant The Ohio Casualty Insurance Company.

XIX.

The Court finds that at the time of said accident George B. Page individually or doing business as Mission Linen and Towel Supply Company was not a person operating or using a vehicle owned by or registered in the name of the Named Assured in the policy of the defendant The Ohio Casualty Insurance Company and that therefore the said George B. Page individually or doing business as Mission Linen and Towel Supply Company is not insured by or indemnified by the policy of the defendant The Ohio Casualty Insurance Company.

XX.

The Court finds that George B. Page acting individually and doing business as Mission Linen and Towel Supply Company at all times acted in a different capacity from G. B. Page as a partner of R. H. McKeon doing business as Pacific Laundry & Dry Cleaners and at all such times acted outside the coverage of the policy of the defendant The Ohio Casualty Insurance Company; the Court finds that the renting or leasing of the truck by George B. Page doing business as Mission Linen and Towel Supply Company to R. H. McKeon and G. B. Page doing business as Pacific Laundry & Dry Cleaners as set forth in paragraph IX of these Findings and the ownership of said truck by George B. Page individually and doing business under the fictitious name of Mission Linen and Towel Supply Company, and the registration

of said truck to Mission Linen and Towel Supply Company (as set forth in paragraph XI of these Findings) were activities and functions of the said G. B. Page, also known as George B. Page, in capacities other than as partner of R. H. McKeon in any partnership which was an insured under the policy of The Ohio Casualty Insurance Company. [68]

XXI.

The Court finds that the endorsements included as part of the policy of The Ohio Casualty Insurance Company issued to Camp Cooke Post Exchange, Camp Cooke, California, and each of them, were issued for the protection of the said Camp Cooke Post Exchange in connection with activities of the assureds conducted on behalf of Camp Cooke Post Exchange and that said endorsements did not otherwise affect or modify said policy and were not intended so to do; the Court finds that at the time of the accident in question the truck was not being operated on behalf of Camp Cooke Post Exchange.

XXII.

The Court finds that Mission Linen and Towel Supply Company is and at all times involved herein has been the same as Mission Linen & Towel Supply Company and that Pacific Laundry and Dry Cleaners is and at all times involved herein has been the same as Pacific Laundry & Dry Cleaners and that the said appellations have been used by the insurance company parties hereto interchangeably.

CONCLUSIONS OF LAW

From the foregoing findings of fact the Court makes the following conclusions of law:

I.

That the plaintiff United Pacific Insurance Company is obligated under its contract of insurance to provide a defense of its assureds George B. Page individually and doing business as Mission Linen and Towel Supply Company and Floyd Gilbert in the action "Robert Echols and Beverly Echols vs. R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry & Dry Cleaners and G. B. Page doing business individually under the fictitious name of Mission Linen and Towel Supply and [69] Floyd Gilbert," which action is pending in the Superior Court of the State of California, in and for the County of San Luis Obispo; that the said plaintiff is obligated under its said contract of insurance and within the limits thereof to respond to and satisfy any judgment which may be rendered against its said assureds or either of them in said action.

II.

That the defendant The Ohio Casualty Insurance Company is obligated under its contract of insurance to provide a defense in the aforesaid action for its assureds R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners and, within the limits of said policy, and subject to the provisions of paragraph III of these conclusions of law, to respond to and to pay any judgment which may be rendered in the said action against its assureds R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners.

III.

That the plaintiff United Pacific Insurance Company and the defendant The Ohio Casualty Insurance Company are jointly obligated to respond to and satisfy any judgment for death or injury rendered in said San Luis Obispo action against R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners as follows:

(a) Equally and co-extensively, dollar for dollar, until said judgment or judgments are satisfied or until plaintiff's policy limits (of $10,000.00 for injury to or death of one person and $25,000.00 for the entire accident) are exhausted, whichever sum is smallest, and

(b) The satisfaction of the balance if any of any judgment in excess of $20,000.00 (twice plaintiff's limit) for death of or injury to any one person and $50,000.00 for the entire accident [70] shall be the obligation of the defendant, The Ohio Casualty Insurance Company.

IV.

That the plaintiff United Pacific Insurance Company and the defendant The Ohio Casualty Insurance Company are obligated to respond to and satisfy any judgment for property damage which may be rendered in said San Luis Obispo action against R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners equally and co-extensively, dollar for dollar, until said judgment or judgments are satisfied or until the combined payments of said parties equal the sum of $10,000.00 (twice the $5,000.00 limit of each policy) whichever is the smaller sum.

V.

That the rights and obligations of the parties hereto are and shall be the same as herein set forth with respect to any other action which may hereafter be brought by Robert Echols or Beverly Echols seeking damages arising from the negligence of Floyd Gilbert in the operation of the said truck at the time and place of said accident.

VI.

That the plaintiff United Pacific Insurance Company insures the liability of Floyd Gilbert in connection with the said accident of January 16, 1946, and is obligated, within the limits of its policy, to respond to and satisfy any judgment which may be rendered against Floyd Gilbert in connection with the said accident. Said plaintiff United Pacific Insurance Company is also obligated, within the limits of its policy, to reimburse defendant The Ohio Casualty Insurance Company for all expenditures, reasonably and necessarily made, or to be made by it, to or on behalf of Robert Echols or Beverly Echols: (1) in satisfaction, in whole or in part, of any judgment which may be recovered by Robert Echols or Beverly Echols in the aforesaid San Luis Obispo action or [71] (2) in compromise settlement, in whole or in part, of the claims of Robert Echols or Beverly Echols arising from said accident of January 16, 1946.

July 31, 1947.

WM. C. MATHES
Judge

[Endorsed]: Filed Jul. 31, 1947. Edmund L. Smith, Clerk. [72]

In the District Court of the United States
Southern District of California
Central Division

No. 6024-WM

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a corporation, et al.,

Defendants.

JUDGMENT

The above action came on for trial in the above court before the Honorable William C. Mathes, judge presiding, on June 13, 1947, the plaintiff being represented by its attorneys Harry E. Sackett and Raymond G. Brown, the defendant The Ohio Casualty Insurance Company being represented by its attorneys, Parker, Stanbury & Reese (Raymond G. Stanbury appearing), the defendants Robert Echols and Beverly Echols having appeared through their attorney A. H. Brazil, and having been legally notified of the time and place of trial but being voluntarily absent, and the other defendants not being present, the foregoing and named parties having filed their written stipulation as to the facts and issues, the plaintiff and the defendant The Ohio Casualty Insurance Company having further stipulated that the Court should determine their respective rights and liabilities as to Floyd Gilbert and should [73] decide whether plaintiff alone, or both of said parties, is or are obligated to provide indemnity for his tort involved herein, and the cause having been argued

and continued to July 11, 1947, at which time the appearances of parties and counsel were the same as on June 13, 1947, save that attorney Raymond G. Brown did not appear, the parties having rested, and the Court being fully advised in the premises, and having made its Findings of Fact and Conclusions of Law,

It Is Hereby Adjudged and Decreed that the rights, duties and obligations of the parties hereto are as follows:

I.

That the plaintiff United Pacific Insurance Company is obligated under its contract of insurance to provide a defense of its assureds George B. Page individually and doing business as Mission Linen and Towel Supply Company and Floyd Gilbert in the action "Robert Echols and Beverly Echols vs. R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry & Dry Cleaners and G. B. Page doing business individually under the fictitious name of Mission Linen and Towel Supply and Floyd Gilbert," which action is pending in the Superior Court of the State of California in and for the County of San Luis Obispo; that the said plaintiff is obligated under its said contract of insurance and within the limits thereof to respond to and satisfy any judgment which may be rendered against its said assureds or either of them in said action.

II.

That the defendant The Ohio Casualty Insurance Company is obligated under its contract of insurance to provide a defense in the aforesaid action for its assureds R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners and,

within the limits of said policy, and subject to the provisions of paragraph III of this judgment, to [74] respond to and to pay any judgment which may be rendered in the said action against its assureds R. H. McKeon and G. B. Page doing business under the fictitious name of Pacific Laundry and Dry Cleaners.

III.

That the plaintiff United Pacific Insurance Company and the defendant The Ohio Casualty Insurance Company are jointly obligated to respond to and satisfy any judgment for death or injury rendered in said San Luis Obispo action against R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners as follows:

(a) Equally and co-extensively, dollar for dollar, until said judgment or judgments are satisfied or until plaintiff's policy limits (of $10,000.00 for injury to or death of one person and $25,000.00 for the entire accident) are exhausted, whichever sum is smaller, and

(b) The satisfaction of the balance, if any, of any judgment in excess of $20,000.00 (twice plaintiff's limit) for death of or injury to any one person and $50,000.00 for the entire accident shall be the obligation of the defendant The Ohio Casualty Insurance Company.

IV.

That the plaintiff United Pacific Insurance Company and the defendant The Ohio Casualty Insurance Company are obligated to respond to and satisfy any judgment for property damage which may be rendered in said San Luis Obispo action against R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners, equally and co-extensively, dollar for dollar, until said

judgment or judgments are satisfied or until the combined payments of said parties equal the sum of $10,000.00 (twice the $5,000.00 limit of each policy) whichever is the smaller sum. [75]

V.

That the rights and obligations of the parties hereto are and shall be the same as herein set forth with respect to any other action which may hereafter be brought by Robert Echols or Beverly Echols seeking damages arising from the negligence of Floyd Gilbert in the operation of the said truck at the time and place of said accident.

VI.

That the plaintiff United Pacific Insurance Company insures the liability of Floyd Gilbert in connection with the said accident of January 16, 1946, and is obligated, within the limits of its policy, to respond to and satisfy any judgment which may be rendered against Floyd Gilbert in connection with the said accident. Said plaintiff United Pacific Insurance Company is also obligated, within the limits of its policy, to reimburse defendant The Ohio Casualty Insurance Company for all expenditures, reasonably and necessarily made, or to be made by it, to or on behalf of Robert Echols or Beverly Echols: (1) in satisfaction, in whole or in part, of any judgment which may be recovered by Robert Echols or Beverly Echols in the aforesaid San Luis Obispo action or (2) in compromise settlement, in whole or in part, of the claims of Robert Echols or Beverly Echols arising from said accident of January 16, 1946.

VII.

The parties United Pacific Insurance Company and The Ohio Casualty Insurance Company, and each of them,

are hereby severally directed to perform the obligations declared in this judgment, all in accordance with the foregoing declaration and as the same may arise.

July 31, 1947.

WM. C. MATHES
Judge

Judgment entered Jul. 31, 1947. Docketed Jul. 31, 1947. C. O. Book 44, page 491. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy. [76]

Received copy of the within Judgment this 30 day of July, 1947. Harry E. Sackett, B/W, Attorney for Plaintiff.

[Endorsed]: Filed Jul. 31, 1947. Edmund L. Smith, Clerk. [77]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that United Pacific Insurance Company, a corporation, the Plaintiff above named, hereby appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from the final judgment and the whole thereof, which was entered in this action on the 31st day of July, 1947.

HARRY E. SACKETT
Attorney for Plaintiff
RAYMOND G. BROWN
Attorney for Plaintiff

[Endorsed]: Filed & mld. copies to Parker, Stanbury & Reese and A. H. Brazil, Oct. 24, 1947. Edmund L. Smith, Clerk. [78]

GENERAL CASUALTY COMPANY OF AMERICA
Copy Seattle, Washington

Bond No. 126,013
Premium: $10.00

In the United States District Court
Southern District of California
Central Division

Civil No. 6024 WM

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a corporation; R. H. McKEON, Individually; GEORGE B. PAGE, Individually; R. H. McKEON and G. B. PAGE, d/b/a under the fictitious name of PACIFIC LAUNDRY AND DRY CLEANERS; GEORGE B. PAGE, Individually and d/b/a under the fictitious name of MISSION LINEN AND TOWEL SUPPLY COMPANY,

Defendants.

COST BOND ON APPEAL

Whereas, judgment was entered in a civil action tried before the Hon. William C. Mathes, a judge in and for the above entitled court, and judgment having been rendered on the 31st day of July, 1947, declaring the rights, legal relations and status of plaintiff, United Pacific In-

surance Company, a corporation, and defendant, The Ohio Casualty Insurance Company, a corporation, and

Whereas, United Pacific Insurance Company, a corporation, plaintiff has filed Notice of Appeal from the said judgment to the United States Circuit Court of Appeals for the Ninth Circuit,

Now, Therefore, United Pacific Insurance Company, a corporation, plaintiff as principal, and General Casualty Company of America, a corporation organized and existing under the laws of the State of Washington, with its principal office in the City of Seattle and authorized to transact surety business in the State of California pursuant to the Act of Congress of August 18, 1934, entitled "An Act relative to recognizance, stipulation, bonds and undertakings and to allow certain corporations to be accepted as surety thereunder," as Surety, are held and firmly bound and undertake that said appellant will pay all costs and disbursements which may be awarded against it on said appeal and that said appellant will satisfy any judgment for costs which may be given against it in the Appellate Court on Appeal not to exceed, however, the sum of Two Hundred Fifty and No/100 ($250.00) Dollars.

Signed, Sealed and Dated this 23rd day of October, 1947.

UNITED PACIFIC INSURANCE COMPANY,
a corporation,
Appellant

By Harry E. Sackett
Raymond G. Brown
Its Attorneys

(Seal)

GENERAL CASUALTY COMPANY OF AMERICA

By J. J. McHugh

Attorney-in-Fact

State of California
County of Los Angeles—ss.

On this 23rd day of October, A. D., 1947, before me, M. M. Jackson, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared J. J. McHugh, Attorney-in-Fact of the General Casualty Company of America, to me personally known to be the individual and officer described in and who executed the within instrument, and he acknowledged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles, County of Los Angeles, the day and year first above written.

(Seal) M. M. JACKSON

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires May 1, 1951.

[Endorsed]: Filed Oct. 24, 1947. Edmund L. Smith, Clerk. [79]

[Title of District Court and Cause]

STATEMENT OF POINTS ON WHICH APPELLANT WILL RELY ON APPEAL

Plaintiff having lately filed its Notice of Appeal from the judgment of this Court to the Circuit Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the Record on Appeal, does hereby file its statement of the points on which it intends to rely upon appeal.

1. That the District Court erred in not following the rule of Erie Railroad Company vs. Tompkins, 304 U. S. 64, in that it failed to follow and apply the law of California in deciding the case.

2. The District Court erred in deciding that Defendant, The Ohio Casualty Insurance Company, was entitled to subrogate and recoup its loss against [80] the driver of the accident vehicle, Floyd Gilbert, based on the remote possibility that said Floyd Gilbert might at some future time be served with Summons in an action for damages arising out of the same transaction, and judgment had against him as the negligent servant of his employers.

3. Having undertaken to declare the rights, legal relations and status of the parties based upon such remote contingency, the District Court erred in not deciding that Floyd Gilbert was an insured within the meaning of the policy of insurance issued by The Ohio Casualty Insurance Company.

4. Having decided that there was double insurance, the District Court erred in not holding that The Ohio Casualty Insurance Company should pay 5/7 and United Pacific Insurance Company 2/7 of the liability or loss.

5. That the District Court erred in deciding that Plaintiff, United Pacific Insurance Company was obligated to respond to and satisfy any judgment which might be recovered against Floyd Gilbert in connection with the accident giving rise to the litigation.

6. The District Court erred in deciding that United Pacific Insurance Company is obligated to reimburse the Ohio Casualty Insurance Company for all expenditures reasonably and necessarily made or to be made by it, to or on behalf of Robert Echols or Beverly Echols; (1) in satisfaction, in whole or in part, of any judgment which might be recovered by Robert Echols and Beverly Echols in the aforesaid controversy.

7. That the Court erred in entering and rendering judgment on July 31, 1947.

HARRY E. SACKETT

Attorney for Pltf. and Appellant, United Pacific Ins. Co.

RAYMOND G. BROWN

Attorney for Pltf. and Appellant, United Pacific Ins. Co. [81]

Received copy of the within this 5th day of Nov., 1947. Parker, Stanbury & Reese, T, Attorney for Deft.

[Endorsed]: Filed Nov. 5, 1947. Edmund L. Smith, Clerk. [82]

[DOCKET ENTRIES]

6024-WM Docket

Title of Case

United Pacific Insurance Co., a corp., vs. The Ohio Casualty Ins. Co., a corp., R. H. McKeon, individually; George B. Page, R. H. McKeon and G. B. Page, dba Pacific Laundry and Dry Cleaners; George P. Page dba Mission Linen and Towel Supply Co.; Floyd Gilbert, Robert Echols, Beverly Echols.

Attorneys

For Plaintiff: Harry E. Sackett.

For Defendant Ohio Cas. Ins. Co.: Parker, Stanbury & Reese; A. H. Brazil for Echols.

Declaratory jmt.

Date	Plaintiff's Account	Received	Disbursed
11/26/46	Harry E. Sackett	15 00	
1-14-47	Treas T 3		15 00
10-24-47	United Pac. Ins. Co.	5 00	[86]

Date	Filings—Proceedings
11/26/46	Fld complaint for declaratory jmt. Issd sum. Made Report J. S. 5. Clerk's Fees Plaintiff 15 –
12/16/46	Fld sep answer of deft Ohio Casualty Ins. Co. Amount Reported in Emoulment Returns 15 –

1 /3/47 Fld not of mot of plf to adv cause for hrg, ret 1/13/47. Fld mot of plf to advance cause for hrg, with affid H. E. Sackett in suppt.

1/ 3/47 Fld sum ret part served.

1/13/47 Ent ord mo to advance cause for hrg go off calendar.

2/ 8/47 Fld answer of deft Robert Echols and Beverly Echols.

4/14/47 Ent ord settg for trial 4/18/47 at 10 AM.

4/18/47 Fld letter of 4/16/47 of Parker, Stanbury & Reese to Jdge Mathes. Ent ord settg for pretrial hrg & settg on 5/26/47.

5/19/47 Fld appln of Raymond G. Brown, non-res atty to appear in case. Fld ord permittg Raymond G. Brown, non-res atty to appear in trial.

5/23/47 Fld stip of facts & issues. Fld pretrial brief of plf.

Fld pretrial memo of the Ohio Casualty Ins Co.

5/26/47 Ent ord settg for trial 6/13/47 at 10 AM.

6/11/47 Fld defts supplmtl pre-trial memo.

6/13/47 Ent proc on trial. Fld 1 plf ex. Ent proc on arg.

Ent ord cont 7/11/47 for fur trial at 1:30.

7/11/47 Court finds with respect to the accident of 1/16/46 the policies of both pltf and deft cover, and both are bound to respond according to their policies. Counsel for deft to prepare formal order pur rule 7 in 5 days.

7/28/47 Counsel discuss findings and will resubmit them 7/30/47.

7/31/47 Fld findings of Fact and Conclusions of Law.

Fld & entered judgt declaring rights and obligations of the parties, at Cob 44/491. D&I Judgt. Notified attys. Made Report J. S. 6.

8/ 6/47 Fld not of entry of jmt. [87]

10/14/47 Fld rptrs trans of proceedgs.

10/24/47 Fld Not of Appeal, of pltf and mald copies to Parker, Stanbury & Reese, attys for Ohio Cas. Ins. Co. and A. H. Brazil, atty for Robert and Beverly Echols. Fld. Cost bond on appeal in the amt of $250.00. Clerk's Fees Plaintiff 5 –

11/ 5/47 Fld plfs desig of contents of record on appeal.

Fld. plfs stmt of points on which appellant will rely on appeal.

11/ 6/47 Fld in dup copies rptrs trans dtd 7/11/47; 6/13-7/28/47. [88]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 88, inclusive, contain full, true and correct copies of Complaint for Declaratory Judgment together with a portion of Exhibit A thereto; Separate Answer of Defendant The Ohio Casualty Insurance Company together with a portion of Exhibit A thereto; Summons with return of Marshal re service of defendant Floyd Robert Gilbert; Answer of Defendants Robert Echols et al.; Letter dated April 6, 1947 from Parker, Stanbury & Reese to Honorable William C. Mathes, Judge; Order for Pre-Trial Hearing; Stipulation of Facts and Issues; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Cost Bond on Appeal; Statement of Points on Which Appellant Will Rely on Appeal; Designation of Contents of Record on Appeal and Docket Entries which, together with copy of Reporter's Transcript of Proceedings on June 13, 1947, July 11, 1947 and July 28, 1947 and Original Plaintiff's Exhibit 1, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $22.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 26 day of November, A. D. 1947.

(Seal) EDMUND L. SMITH
Clerk
By Theodore Hocke
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Friday, June 13, 1947

Appearances:

For the Plaintiff: Harry E. Sackett, Esq., and Raymond G. Brown, Esq.

For the Defendant Ohio Casualty Co.: Parker, Stanbury & Reese, by Raymond G. Stanbury, Esq.

For the Defendants Echols: A. H. Brazil, Esq.

Los Angeles, California, Friday, June 13, 1947
10:00 A. M.

The Court: Is there evidence to be offered, gentlemen?

Mr. Stanbury: Your Honor, I have been requested to make a stipulation by counsel for the plaintiff and I am ready to do so. Your Honor may remember the discussion of this at the time of the pre-trial hearing. We deny that this has any materiality, but they are the facts, and therefore we are offering the stipulation.

The stipulation is that the defendant's assured Pacific Laundry and Dry Cleaners had rented this truck for a period of one year from the United's insured; that Ohio's assured had paid rental on it throughout that period and that the truck bore the legend "Pacific Cleaners" as shown in this photograph which we offer in duplicate, if your Honor cares to see the photograph.

The Court: Do you join in that stipulation?

Mr. Sackett: We join in it, your Honor.

Mr. Stanbury: As to when that "Pacific Cleaners" was put on the truck neither side are able to ascertain.

The Court: But it was during the life of both policies, was it?

Mr. Stanbury: Well, sir, we do not know whether it was done before Pacific Laundry and Dry Cleaners took possession of it or afterwards. It would probably be an inference that it was afterwards. The name is "Pacific Cleaners" and I do [3*] not even know whether that is the name of some previous activity or what it is.

The Clerk: The photographs will be marked Plaintiff's Exhibit 1.

Mr. Stanbury: Yes, sir.

The Court: Both photographs received into evidence as Plaintiff's Exhibit 1 pursuant to the stipulation.

Is there any further evidence to be offered?

Mr. Stanbury: No, sir.

Mr. Sackett: That is all we have, your Honor.

The Court: Then it is submitted upon the facts as now stipulated?

Mr. Stanbury: Yes, sir.

The Court: That is, the written stipulation plus the stipulation made here this morning, is that correct?

Mr. Stanbury: Yes, sir.

The Court: I will hear from the plaintiff.

Mr. Brown: If the court please, and counsel:

This is a controversy between the two insurance carriers, United Pacific Insurance Company of Tacoma, Washington, and Ohio Casualty Insurance Company of Hamilton, Ohio. The other parties to this proceeding are merely standing by awaiting the outcome of this controversy.

To begin at the beginning, on the 16th day of January, 1946, Mr. Robert Echols and his son, Beverly Echols, were [4] driving their automobile on the highway, I

*Page number appearing at top of page of original Reporter's Transcript.

believe in San Luis Obispo County at that time, and approaching from the opposite direction one Floyd Gilbert was driving the truck shown in the photograph just handed to your Honor. The truck was operating from the opposite direction and, as we understand the facts, got on the wrong side of the highway and collided practically head-on with Mr. Echols and his son.

The Court: In any event it is stipulated that the negligence of the driver Gilbert was the proximate cause of the injuries?

Mr. Brown: It is so stipulated.

The Court: And that the Echols, that is, Robert and Beverly Echols, together are entitled to recover by reason thereof in excess of $3,000.

Mr. Brown: It is so stipulated.

The Court: In the San Luis Obispo Superior Court action.

Mr. Brown: Yes, sir. They have filed their action there and, as parties defendant in that action or claim, R. H. McKeon and G. B. Page—this is from page 2 of the stipulation—dba under the fictitious name of Pacific Laundry and Dry Cleaners, and also G. B. Page dba under the fictitious name of Mission Laundry and Towel Supply Company.

The Court: Mission Linen.

Mr. Brown: I am sorry, your Honor. Mission Linen and [5] Supply Company, and Floyd Gilbert who was the driver.

The Court: The vehicle was registered in the name of G. B. Page doing business under the fictitious name of Mission Linen and Towel Supply?

Mr. Brown: That is correct.

The Court: That is, registered with the California Motor Vehicle Department?

Mr. Brown: That is correct, your Honor.

In the action in San Luis Obispo County Floyd Gilbert has never been served with summons. That is also stipulated.

Floyd Gilbert was named as a party in this proceeding, but examination of the Return of the Marshal shows that he was not served in this proceeding. The only information I have on the subject that I consider entirely reliable is that contained on the Return of the Marshal to the effect that he is no longer in the State of California.

The Court: Does the plaintiff now dismiss as to the defendants not served?

Mr. Brown: Yes.

The Court: That would be Floyd Gilbert, alone, as I understand it?

Mr. Brown: Yes; we are quite willing, and will move the court for an order dismissing Floyd Gilbert.

The Court: From this action?

Mr. Brown: From this action. [6]

The Court: The motion is granted.

Mr. Brown: Now coming to the two policies giving rise to the controversy, they are attached to the stipulation. The Ohio Casualty policy is marked Exhibit B, the United Pacific policy, marked Exhibit A.

In point of time the United Pacific policy was first issued. The policies contain all material endorsements that we were able to find.

There is practically no controversy over the construction and meaning of the United Pacific policy.

The Court: Let me ask you there: The United Pacific policy was issued to G. B. Page, individually, and

doing business as Mission Linen and Towel Supply, was it not?

Mr. Brown: That is correct, your Honor.

The Court: Then there can be no question, I take it, that Gilbert was driving the truck and the McKeon and Page concern, which was that Pacific Laundry—

Mr. Brown: Pacific Laundry and Dry Cleaners.

The Court: Pacific Laundry and Dry Cleaners was using the truck with the permission of Page. There is no question about that, is there?

Mr. Brown: There is no question about the fact. There is a question about the effect of that fact.

The Court: Now, let us get to that and see what that question is. [7]

So we have Page, the owner—from one side of it, we have Page, the owner of the vehicle, permitting—before I proceed with that, I take it there is no question of exceptions by reason of Ohio?

Mr. Brown: No; there is no exception by reason of Ohio.

The Court: So, reduced to its lowest common denominator insofar as United is concerned, we have a case where United insured Page as to this vehicle, and at the time of the accident the vehicle was being used with Page's consent by Gilbert?

Mr. Brown: That is the correct fact.

The Court: Whose negligence was the proximate cause of the injury?

Mr. Brown: That is the correct fact.

The Court: In that situation what is the liability of Page under the California law as the owner of a vehicle used by another with his consent?

Mr. Brown: He may be held liable in damages under the California statute.

The Court: Is there any limitation upon that liability?

Mr. Brown: Insofar as permission is concerned it would be necessary to almost show that the car was stolen in order to avoid the application of the vicarious liability statute, but it is not an exclusive liability.

The Court: No. But is there any limitation upon it? [8]

Mr. Brown: $5,000 and $10,000 are the limitations that the statute imposes upon the owner.

The Court: And is that limitation applicable here?

Mr. Brown: That limitation is exceeded here as a matter of fact. although the stipulation may not cover it.

We stipulate that the injury cases are worth more than $3,000 in settlement; as a matter of fact they are worth more than $5,000 as applicable to the one person which the statute covers. The older, Robert Echols, was so seriously injured that his case is worth more in settlement than $5,000 which is the applicable limit of the vicarious statute.

The Court: That is as to each person?

Mr. Brown: As to each person.

The Court: So the limits for the entire accident for which Page, and hence United, could be liable would be $20,000?

Mr. Brown: Under the United Pacific policy the limit as to one person is $10,000.

The Court: I am not talking about the policy. I am talking about the possible liability under the statute.

Mr. Brown: The possible liability under the statute of both injured parties would be only $10,000 for their injuries. The damage to their automobile, property damage, would be in addition to that sum $300.00 to $400.00. [9]

The Court: It would be $5,000 to the person.

Mr. Brown: It would be $10,000 because two persons were injured.

The Court: I thought you said the statute provided ten.

Mr. Brown: Ten for all the persons in one accident; $5,000 for one person injured.

The Court: So that the most, leaving Ohio Casualty out of the picture, that United could be held to respond for here would be $10,000?

Mr. Brown: If we considered only the vicarious liability statute, your Honor, that is correct; but we have voluntarily insured him for an amount in excess of the required statutory limit.

Mr. Stanbury: When your Honor is following the method of interlocution, which I am glad to see the court doing, does the court care for any interruption on a matter of fact where your Honor makes a comprehensive statement?

The Court: Yes, if you are not agreed on the fact.

Mr. Stanbury: That is right. Everything Mr. Brown says we agree on as to Page, but that does not consider Gilbert, the driver.

The Court: Yes. Well, I am leaving Gilbert out of it for the moment.

Mr. Stanbury: I understand. The only reason I [10] interrupted was that your Honor used comprehensive language when you said that was all United Pacific could be liable for, and I wanted to straighten that out right now. I did not know whether your Honor had that in mind or not.

The Court: I am asking that as a question.

Mr. Stanbury: I follow you.

The Court: What could Page be held for?

Mr. Brown: There is no limit on what Page could be held for. There is a limit on the statute of $5,000 for one person and $10,000 for two persons.

The Court: Page is owner of the vehicle.

Mr. Brown: There is that limit. Your Honor is correct.

The Court: What could he be held for?

Mr. Brown: For $5,000 for each of those persons, a total limit of $10,000 for the accident. That is all Page could be held for.

The Court: Page, in that capacity?

Mr. Brown: In that capacity.

The Court: Insured by United, Page could be held for only $10,000, hence United would be compelled to respond only to the extent of $10,000, of course, plus the expense of defending; is that correct?

Mr. Brown: I believe that is correct, your Honor. Under the vicarious liability statute that is correct. That is the only reason that Page can be held here as an [11] individual, as owner of that car.

The Court: All right. That is the capacity in which you have insured him, isn't it, United has insured him?

Mr. Brown: We name him in other capacities, as shown in the beginning of the policy there. We name him and also H. B. Page. We insure him for more than that. This particular accident, however, occurs and gives liability to Page as an individual only by reason of the vicarious liability statute.

The Court: That is what I was attempting to frame my questions to ask. I do not mean with respect to other accidents. I mean with respect to this accident.

Mr. Brown: Yes.

The Court: Is it your contention that the limit of United's liability is only $10,000?

Mr. Brown: Yes; insofar as Page is concerned.

The Court: Then, for the purpose of this accident, the limit of the policy would be only $10,000, would it?

Mr. Brown: For the purpose of this accident. I see your Honor's reasoning. Yes; I believe that is true. We voluntarily issued the policy for a larger amount, but coming to what happened, that is correct.

The Court: For the purpose of this accident, the limit of your liability is fixed by the statute?

Mr. Brown: That is correct. [12]

Mr. Stanbury: As to Page, your Honor.

Mr. Brown: As to Page only.

The Court: As to Page in his individual capacity.

Mr. Brown: As an owner.

The Court: As an owner of the vehicle.

Mr. Brown: As an owner of the vehicle.

The Court: I am not referring to Page as a partner in the enterprise.

Mr. Brown: That is right.

The Court: Then, how could United Pacific escape liability for that coverage at least to the extent of $10,000?

Mr. Brown: There are three reasons, your Honor. We go now to what happened and look at the extended coverage clause of the policy. It provides substantially that, in addition to the Page who is named—

The Court: Anyone using the vehicle with his consent would be covered, wouldn't he?

Mr. Brown: Yes, sir.

The Court: And Gilbert was, wasn't he?

Mr. Brown: He was, yes; we admit that. But there is a limitation on that extended coverage. That limitation is found in the other insurance clause, Exhibit B, page 2, line 64.

The Court: That is completely copied on page 5 of your brief, isn't it? [13]

Mr. Brown: It is, your Honor.

The Court: Well, let us look at that.

> "If at the time of an accident there is any other insurance available to the insured—to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability under this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy."

I take it that the next to the last sentence it not applicable here, is it?

Mr. Brown: That is correct, your Honor; it is not applicable.

The Court: Do you agree, Mr. Stanbury?

Mr. Stanbury: I do, your Honor.

The Court: Let us leave that out. It has a further proviso that covers another situation, doesn't it?

So, after the provisions for excess liability above the limits of other insurance to the extent of the limits of

this policy, the last sentence or clause provides that the [14]

> "Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured."

Now, who is the "insured"?

Mr. Brown: That is defined, your Honor, on the same page under "Definitions," line 26:

> "The unqualified word 'insured' includes not only the named insured but also the spouse,"

the wife.

And coming to this case, paragraph (4)

> "any person while using an owned automobile or hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured, and also any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured."

Then your position as applied to this case would be that Gilbert is insured within that definition?

Mr. Brown: Yes; within that definition.

The Court: That Gilbert, being an employee of the McKeon-Page concern, whatever insurance that concern had would be available within the meaning of the definition and that, hence, under no circumstances, according to this last sentence of the "other insurance" provision of the United |15| Pacific policy there could never be any concurrent insurance. Then, as you construe it, what this alludes to, this "other insurance" provision, it operates to nullify the extent of the coverage?

Mr. Brown: It does. It is a definite limitation on the extended coverage clause. That is why it is in the policy.

The Court: So the effect of this policy, as you read it, would be that there being other coverage available, there is no insurance so far as United is concerned on this accident?

Mr. Brown: That is correct, your Honor.

The Court: Now, if we read the Ohio Casualty policy the same way, we reach the same result.

Mr. Brown: That is why we are here.

The Court: So the result would be, if we follow both arguments and apply that argument to both policies, each insurance policy would knock each other out and there would not be any insurance.

Mr. Brown: Take them literally, that is precisely what would happen in this case, your Honor. Take these two policies literally, that is precisely the result. There would not be any insurance for anyone if you take these two policies literally. That is why we feel that the statutes of this state and the Insurance Code must be read into the contract and that the two contracts must be construed from their four corners in the light of what has happened. [16]

The Court: Of course, the big "if" in both of these "other insurance" clauses is whether there is any other insurance available.

According to the reasoning we have just adverted to, there is no other insurance available. In other words, if you take United's policy and read it, we come to the question: Is there any other insurance available, don't we?

Mr. Brown: Yes.

The Court: So you look around to see if there is any other insurance available and you read Ohio's policy and

you find that that is not available; so there is no other insurance available.

Mr. Brown: We, of course, do not concede that their policy is not available. That is their contention also.

The Court: You necessarily concede that, don't you, when you concede that the literal effect of each policy is such that, if given effect literally, there would be no insurance here?

Mr. Brown: That is right.

The Court: It doesn't make any difference which policy we read first. You represent United Pacific, so we are going to read United Pacific's policy first. So we pick it up and we start to read it and we find it insures Page. We find that Page gave Gilbert permission to use the vehicle. We find that the extended coverage clause, at first blush, [17] applies. Then we ask does the "other insurance" clause limit the extent of the coverage of the policy. It is:

> "If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except"

as to the excess.

We will leave that aside for the moment. So we look around to see if there is any other insurance available. We read Ohio Casualty's policy. If we read it literally, it is not available, is it?

Mr. Brown: To whom? Available to whom?

The Court: To anyone.

Mr. Brown: That is the question. That is where we come next. And the next step is: available to whom, to the injured parties?

The Court: Let us assume you ascertain it is not available to Gilbert, it is not available to anyone. If it

were applicable, of course, it would be available. But if you read Ohio Casualty's policy, it is not available because United Pacific's is available.

Mr. Brown: If I might interrupt your Honor's thinking for one moment here?

The Court: Am I correct that far, literally stated?

Mr. Brown: Yes. But you are just coming to the next [18] step, your Honor, and that is this: Why are we trying Gilbert throughout this case? Gilbert is no more an essential party to the controversy in the state case, the damage action, than if he were a mere myth.

The statute imposes vicarious liability on Page as an owner. We all know that the master is responsible for the negligent acts of his servant, therefore, the injured parties in San Luis Obispo County do not need to find Mr. Gilbert, do not need to go out of the State of California and find him in order to recover for their damages for their injuries.

Gilbert has been throughout this case on a theory which has come from the other side of the controversy. We do not feel that Mr. Gilbert is any more a necessary party to either this proceeding before your Honor this morning or to the other court than if he did not exist.

The Schilling case, early in California jurisprudence, decided that. The Schilling case holds, your Honor, that it is not necessary for a servant to be joined in a damage action along with the master. The injured party, the plaintiff, may elect as against whom he will proceed.

That is why we are having our difficulty in this case; we are giving too much thought to Mr. Gilbert. Mr. Gilbert can be a mere myth and the parties in this case can recover for their injuries and the controversy can be decided as between these two companies. Your Honor

was certainly correct in [19] suggesting that he be dismissed from this proceeding.

The Court: Then why wouldn't United Pacific, then, under its policy, which insures Page as owner and is responsive in this situation for Page's vicarious liability under the statute?

Is there any other insurance that covers Page's vicarious liability as owner of this truck?

Mr. Brown: Yes, your Honor; there is. Turn now to the Ohio Casualty policy, who is the second named on there as a named insured, G. B. Page. Page is a common name to both these policies. He is in both of them, and there is a statute in California which defines the owner of a motor vehicle for insurance purposes as "any person named as an insured." That statute is quoted in our brief.

The Court: But does the Ohio policy cover this particular vehicle?

Mr. Brown: Yes. Your Honor, here is the confusion that might exist: Neither of these policies of insurance makes any mention of the accident vehicle. These policies are written on what is now described as the "comprehensive liability form."

The Court: So they both stand on the same footing so far as identifying a particular vehicle?

Mr. Brown: That is correct. A particular identification of the vehicle is not necessary. [20]

The Court: No. I understand. I did not recall from my examination whether either of them mentioned the vehicle.

Mr. Brown: No.

The Court: I thought perhaps United did.

Mr. Brown: We do not, neither does Ohio Casualty. And while we are on this subject of what the Ohio Cas-

ualty policy covers, I wish your Honor would turn to Exhibit B, page 5. I think we can settle this controversy as to the meaning of the Ohio Casualty policy very shortly by reference to the endorsement. It is entitled "certificate of insurance." It is numbered page 5 on Exhibit B.

The Court: Yes; I have it before me.

Mr. Brown: It was issued at a time subsequent to the issuance of the policy. And, of course, as your Honor will recall, it is fundamental that any endorsement bearing a subsequent date to the policy controls should there be a conflict.

Now, then, what is the "Description of risk" under that certificate of insurance? It says:

> "Coverage applies to all automobiles owned or operated * * *."

Certainly this automobile was operated by McKeon and Page.

The Court: I do not think there should be any question about that. There is no dispute about that, is there?

Mr. Brown: From the photograph of the truck there is no [21] dispute about it.

The Court: Who is the named insured here?

Mr. Brown: The named insured?

The Court: In the Ohio Casualty's policy.

Mr. Brown: The named insured appears first on the regular form of the policy as R. H. McKeon and G. B. Page.

The Court: Doing business as Pacific Laundry and Dry Cleaners; correct?

Mr. Brown: Yes, your Honor; that is correct. Then on subsequent endorsements others are named, also,—not that it makes any difference, we feel.

The Court: You mean the Fashion Cleaners and Mission Laundry & Cleaners?

Mr. Brown: Yes, your Honor.

The Court: But it is always McKeon and Page, isn't it?

Mr. Brown: Yes; it is always McKeon and Page. Our position is that the Ohio Casualty is responsible under the vicarious liability statute the same as the United Pacific policy, because the statute and the Insurance Code quoted in our brief defines an "owner" for all the purposes, and says an owner is any person who is named as an insured in a policy of automobile liability insurance.

The Court: I tried to follow that argument in the brief but I did not get very far with that.

Mr. Brown: Well, the statute goes further, your Honor, and [22] says why it was passed. It was passed to prevent mistake—the exact words are better than my recollection.

The Court: "Fraud," as I recall.

Mr. Brown: Yes.

The Court: But let us take the names of these insured. The United Pacific policy mentions Page, individually, doesn't it?

Mr. Brown: It does.

The Court: Among others. The Ohio Casualty mentions only Page, in his capacity as a partner with McKeon, doesn't it?

Mr. Brown: Yes; in connection with the business. That is conceded, of course.

The Court: Doesn't that leave us with this situation: That while Page's assets are amenable to execution, the debts of the partnership, the primary liability would be assets of the partnership; would that not be true?

Mr. Brown: That would be true.

The Court: So the primary liability for the damage Gilbert caused in this situation here would be the partnership and its assets?

Mr. Brown: That is true.

The Court: Is that correct?

Mr. Brown: That is true.

The Court: And that is the liability, is it not, of the Ohio Casualty insured? That is the liability of the [23] operator, isn't it? It is not the vicarious liability under the statute of the owner, is it?

Mr. Brown: We feel, your Honor, that under the statute, the plain language of the statute, the word "owner" as used in this section means any person who is named as an insured. Therefore, R. H. McKeon is an owner of this accident vehicle by the clear language of the statute.

The Court: That may be an owner for the purpose of reading an insurance policy. I am referring to the owner mentioned in the code.

Mr. Brown: The actual owner under the Motor Vehicle Registration Act?

The Court: The owner who is held vicariously liable under the statute where the automobile is used by another with his permission, is not that owner defined in the definition as set forth in the Insurance Code to which you referred?

Mr. Brown: No. This owner here is the owner mentioned in the insurance contracts.

The Court: Yes.

Mr. Brown: Not the party who must go up and pay the license fee and secure the registration.

The Court: All right. Then do we not have this situation here: Do we not have a situation where United Pacific insured the owner, that is, the man who is held

liable [24] vicariously under the statute? United Pacific insured that man's liability and insured that liability?

Mr. Brown: That is, that was one of the hazards. We do not deny it.

The Court: In other words, we are not going to treat this matter in a vacuum; we are going to apply this policy to this case.

Mr. Brown: That is it exactly.

The Court: So, as applied to this case, your policy, the United Pacific policy, clearly covered the vicarious liability of the owner under the statute?

Mr. Brown: Correct.

The Court: A maximum of $10,000 liability.

Now, let us turn around and put Ohio Casualty's policy in this case. What liability did Ohio Casualty insure?

Ohio Casualty insured the respondeat superior liability of the partnership, McKeon and Page, did it not?

Mr. Brown: They did.

The Court: And what is that liability? Isn't that liability an entirely independent creation of the law from vicarious liability of the owner?

Mr. Brown: It arises from a different ground; yes.

The Court: It is an entirely different liability, isn't it?

Mr. Brown: Yes. But— [25]

The Court: And there is no limit to it, is there?

Mr. Brown: No limit whatsoever.

The Court: It is not a creation of the statute; it is a creation of the common law, isn't it?

Mr. Brown: Yes; it is the creation of the common law.

The Court: So, do we not have two different insurance companies here insuring two different types of liability?

Mr. Brown: No; I can't believe that is correct, your Honor. There are three reasons why it is not.

No. 1, of course, is the insurance code definition defining "owner" for the very purpose—

The Court: That is a different one. That is talking about the owner mentioned in the insurance policy, whereas we are talking about the owner mentioned in the statute imposing vicarious liability.

Mr. Brown: Your Honor would be absolutely—

The Court: Which might be an entirely different type of person, because the owner mentioned in the insurance code definition to which you refer would include the man who is driving with the consent of the owner mentioned in the statute imposing vicarious liability, would he not?

Mr. Brown: Yes; that is true.

The Court: In other words, specifically applied here, it would include the owner. Gilbert would be an owner within the meaning of that insurance code definition, would he not? [26]

Mr. Brown: No, no, no, your Honor; because Gilbert is not named on the face of the policy.

The Court: Using it, operating it with the consent of the owner.

Mr. Brown: Not under Section 383.5. The word "owner" as used in this section means any person who is named as an insured in such contract of insurance or document.

The Court: Perhaps I am remembering it incorrectly. Is that all it says?

Mr. Brown: No; there is more to it, some of which we did not feel was pertinent. But it concludes with a recital of its purpose. That recital is in the following language:

> "The purpose of this section is to prevent fraud or mistake in connection with the transaction of insurance covering motor vehicles and in furtherance of

that purpose the commissioner may make reasonable rules and regulations therefor."

It seems to fit like a glove your Honor's thought of a few moments ago. I can fully appreciate that would be controlling, though a statutory defense under the vicarious liability statute would end the matter if we did not have any insurance in the picture. But here we have two policies of insurance, and Section 383.5 was written specifically to cover insurance policies on automobiles and it has its own recital of why it was passed. Therefore, we feel that it [27] is controlling. It was passed for a particular purpose, according to its own language.

The Court: The definition of "owner" in Section 383.5 of the Insurance Code is applicable only to that section, isn't it?

Mr. Brown: But the purpose of the section—just there, it is true that that would go only as to what that section means, but that section deals specifically with insurance on motor vehicles and it concludes with that recital of why it was passed.

The Court: Yes. Does that definition, which is limited to "owner" as used in that section, namely, section 383.5, carry over and becomes the definition of "owner" under the statute imposing vicarious liability?

Mr. Brown: The two statutes deal with entirely different subjects, your Honor. One deals with the ownership of motor vehicles, having no apparent thought to insurance; and if we did not have any insurance policies involved here, the statute defining "owner" as to his liability would end the matter.

But here we have not one, but two, policies of insurance and the statute dealing specifically with contracts of insurance on motor vehicles, passed on a subsequent date,

dealing specifically with the subject matter under consideration. [28]

The Court: What is the citation of the statute imposing vicarious liability?

Mr. Stanbury: 402 of the Vehicle Code.

The Court: 402 of the Vehicle Code.

Mr. Brown: 402 of the Vehicle Code. I do not have it at my fingertips.

Mr. Sackett: I have it right here.

The Court: It is virtually the same today, isn't it, as it was when it was in the Civil Code?

Mr. Stanbury: That is correct, your Honor.

Mr. Sackett: No change.

Mr. Brown: We have it here if your Honor wants it.

The Court: I have sent for a copy. Would not the fact that that provision is an entirely different code militate against your argument that the definition of "owner" as contained in the Insurance Code section 383.5 would carry further?

Mr. Brown: My understanding of the statutory construction, your Honor, is this: There are two or three fundamental principles. One is that if we have a statute dealing with a particular subject matter, then it applies. We have here a statute dealing with contracts of insurance and those contracts of insurance are the cause of our controversy. The existence of these two contracts is why we are here this morning. [29]

The Court: But we have to look outside the insurance code and outside the policy to determine whether there is any liability on the part of the insured for which the insurer must respond, do we not?

Mr. Brown: Your Honor is quite correct.

The Court: And the policy only measures the obligation of the insured to respond to a previously determined liability of the insurer; is that correct?

Mr. Brown: That is correct.

The Court: So we must look; and first, we must determine who are covered—not what is covered, but who are covered by the policy.

Mr. Brown: Who are covered.

The Court: Here your policy covers Page, doesn't it?

Mr. Brown: It does; it covers Page.

The Court: As owner of the vehicle?

Mr. Brown: That is correct.

The Court: What are Page's liabilities here? He has a liability as a partner with McKeon, doesn't he?

Mr. Brown: He does have.

The Court: You do not cover that liability, do you?

Mr. Brown: We have felt that we did not. The other side of the case contends we do.

Mr. Stanbury: No; we do not contend that, only if your argument is sound. Pardon me. We make that contention [30] only if your argument as to us is sound, we say. If the identities of the parties are destroyed as against one party, they must be determined against the other. If Page is "Page," then "Page" in your policy and ours alike. But we do not make that contention except as a reply to an opposing argument.

The Court: Go back just a moment to your definition of "owner" in Section 383.5. "Owner" as used in this Section means any person who is named. Do you read that to mean that the name actually has to be in there?

Mr. Brown: Yes; by typing it there or by writing it in. That is what I understand, that his name, the act of naming takes place when the policy writer puts this

piece of paper in her typewriter and writes it up. That is the naming of the insured, is my understanding.

The Court: All right. Then as far as your case is concerned, the only person named in your policy, that is, United Pacific policy, would be Page. You insure Page. You insure Page. And before we look to determine how far or for how much and to what extent you insure Page, we must look first to see whether Page has liability; and if so, what is his liability; is that correct?

Mr. Brown: That is absolutely correct.

The Court: So that is measured, not by the policy; that is measured by the law, isn't it? [31]

Mr. Brown: Or the statute.

The Court: Well, by the common law and the statute. We look to the whole body of the law, do we not, to determine whether Page has any legal responsibility to answer in damages to the persons who were injured in this accident; so we look to the whole body of the law to determine, not to the policy?

Mr. Brown: We do that.

The Court: We look to the whole body of the law to determine what, if any, are Page's liabilities; and we find what? That he has two liabilities, do we not, two types of liability? 1, he has a vicarious liability under the statute as an owner of the vehicle; 2, he has the liability as partner, which is a secondary liability, under his partnership of McKeon and Page, doesn't he, to respond for the act of the agent of the partnership; is that correct?

Mr. Brown: I believe your Honor has overlooked one ground of liability. First, the vicarious liability under the statute; second, the liability of Page as a partner in Pacific Dry Cleaners—

The Court: What is the Pacific Dry Cleaners?

Mr. Brown: That is the business in which—

The Court: Is that McKeon's?

Mr. Brown: That is McKeon's.

The Court: It doesn't make any difference which partner- [32] ship it is, does it? They are McKeon and Page, aren't they? Those are the partnerships?

Mr. Brown: Yes; they are McKeon and Page.

The Court: So Page has a liability of what sort to respond for the negligence of Gilbert otherwise than as owner of the vehicle under the statute?

He has the liability at common law to respond to the extent of any deficiency that might remain after the partnership has been compelled to respond; is that correct?

Mr. Brown: Yes; that is correct. But his liability, first, is that of a partner of McKeon. I thought we were losing track of him. I thought we had forgotten him there as a partner of McKeon.

The Court: No. What would you do? Of course, you can argue philosophically about what a partnership is, but the effect of it is that the partnership is an entity. It is a question of who has to pay, and that is the important thing. If you have that partnership liability, you can be compelled, if you have a claim against the partnership, you can be compelled to resort, first, to the assets of the partnership, can't you?

Mr. Brown: That is correct.

The Court: So the partnership is primarily liable, isn't it?

Mr. Brown: Yes; that is right. [33]

The Court: So Page's other personal liability is a secondary one, isn't it?

Mr. Brown: Insofar as a judgment.

The Court: As an individual, his liability is a secondary one?

Mr. Brown: Yes; I think that is correct.

The Court: All right. United Pacific insured him in his individual capacity; isn't that correct?

Mr. Brown: Yes, followed by a trade name. Yes; we insure him personally, individually and also under his trade name.

The Court: We have disposed of his liability tentatively. You have not insured him as a co-partner in any enterprise, have you?

Mr. Brown: Yes; co-partners not having anything to do with this case.

The Court: Yes; having nothing to do here. So, insofar as these partnerships are concerned, your coverage is Page, anyway, and Page as an individual.

Mr. Brown: Yes; I think that is correct.

The Court: Now, let us assume for the moment that there was no statute imposing vicarious liability upon Page as owner. If these two policies were in existence would not the United Pacific be here saying that Ohio Casualty insured the partnership; Ohio Casualty is primarily liable; we are [34] liable only to respond to Page as an individual.

Mr. Brown: Well, our position is—

The Court: If that would be true, then it would be a sound view, would it not, to say that United Pacific here insured Page's liability under the statute? Ohio Casualty insured the liability as a partner of McKeon to respond for the negligence of an agent of the partnership, Floyd Gilbert?

Mr. Brown: I know what your Honor has in mind. He is comparing the coverage of the two policies.

The Court: No. If you agree as to those liabilities, then we look to see if they are covered by the policies, do we not? That is the second step.

Mr. Brown: Well, we agree as to those liabilities.

The Court: All right. Who covers them? There is no question, is there, but what United Pacific covers vicarious liability of Page as owner under the statute?

Mr. Brown: That is conceded.

The Court: Shall I say the statutory liability of Page? All right. Who covers the liability of Page as a partner? That is the common law liability to respond for the negligence of the servant and agent. Does the United Pacific cover that?

Mr. Brown: We feel that Ohio Casualty covers it.

The Court: This is a common law liability wholly apart from the statutory liability, isn't it? If we can agree that [35] it is sound to say Ohio Casualty covered the partnership by the common law liability and United Pacific covered the statutory liability, we do not have a case where the same insurance covers the same responsibility, do we?

Mr. Brown: I am wondering under the statutory definition of "double insurance" if that is correct. I have the statute handy here. The Statute, Section 590 of the Insurance Code, says: "A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest."

The Court: All right. Now let us carry it a step further. The insurer does not sue under the statute and does sue under common law; the effect of the statute is to compel the owner, as owner, to respond for the damages to the extent of $5,000 as to each individual or, we will say, $10,000 here. So Ohio Casualty is called upon to respond to all of the damages at common law to the extent of the limits of its liability, to the extent of the limits of its policy, is that correct?

Mr. Brown: That is correct.

The Court: Then don't we have the damage and the responsibility, bearing in mind that the injured person could only recover once—don't we have a situation where part of the liability is covered by both policies, that is, the liability up to $10,000? [36]

Mr. Brown: In all candor and fairness to the court, I have worked on this case quite a while.

The Court: I know that both of you gentlemen have.

Mr. Brown: And I have come to the conclusion a long while ago that both of these policies do apply, and that they both insure for the protection of the persons who suffer injuries and damages, and that the liability should be prorated in accordance with two California decisions.

Mr. Stanbury: And, to clarify the issues, we concede that entirely except as to Gilbert. I mean we are agreed on that. We have conceded it in one of our briefs except as to Gilbert.

The Court: Let me get your understanding, gentlemen. You are agreed, are you, that laying aside for the moment Gilbert's independent liability, that Ohio Casualty's policy covers the liability of the partnership for the acts of Gilbert, shall we say the common law liability, to the extent of the limits of its policy, and United Pacific, under the statute, is also liable under its policy to respond to the extent of $10,000; so there is double insurance to the extent of the first $10,000? Is that what you are agreed upon?

Mr. Stanbury: We concede that, that at San Luis Obispo, at the present time, we have a joint liability with the other company and our point arises and revolves around who covers Gilbert. [37]

The Court: Then you have double insurance to the extent of $10,000, is that it?

Mr. Stanbury: Without getting into such quibbles as they go up, I think that is correct.

The Court: Well, that seems sound. Ohio Casualty has covered the partnership, McKeon and Page. That partnership, the partners were sued, the statute says that Page as owner, by reason of his ownership of the vehicle wholly apart from his status as a partner, by reason of his ownership and his consent to the operation of the vehicle by Gilbert at the time of this accident, Page, in his individual capacity as owner, is responsible to the extent of $10,000 for injuries. We have both companies covering the first $10,000 of the liability. Is that agreed?

Mr. Stanbury: Yes, sir.

The Court: Now, what is the status of Gilbert?

Before we take that up, let us give the reporter a little relief and take the morning recess of five minutes.

(Short recess.)

Mr. Brown: As I understand your Honor, we have now reached the point where we can take up the coverage as applicable to Mr. Gilbert.

The Court: Yes. Isn't the situation this as far as Gilbert is concerned? The liability of Page, as owner, the liability of the partnership, as a partnership, all arises from [38] the acts of Gilbert and the liability of Gilbert. The partnership is called upon to respond to the full extent for the liability of Gilbert. Page, as owner, is required to respond to the extent of $10,000 for the liability of Gilbert; so do we not again have the situation where, as far as Gilbert is concerned, United Pacific covers it to the extent of $10,000 and Ohio Casualty covers it to the full limit of the policy?

Mr. Brown: By that am I to understand your Honor feels that the two companies cover concurrently, or is one to pay up to ten and then the other begin paying, or do

both companies, in your Honor's thinking at the moment, cover concurrently?

The Court: My question embraced the proposition that there was double insurance with respect to Gilbert; in fact, the double insurance with respect to Page arises out of Gilbert's act and Gilbert's liability, does it not?

Mr. Brown: Yes. And I believe this is a good time, your Honor, to take up—

The Court: Does not the double insurance which you gentlemen have conceded to exist necessarily spring from Gilbert's liability?

Mr. Brown: That is the proposition I would like to discuss a few moments now.

I have carefully read the case of Consolidated Shippers, [39] I have examined the briefs that are on file and the arguments made.

First, the contention here, the entire theory of this case insofar as the Ohio Casualty is concerned, is simply this, your Honor: That it insures McKeon and Page as a co-partnership; that Gilbert, as the agent and servant of that co-partnership, committed a negligent act; therefore, if the Ohio Casualty is required to pay anything in this case, it is then in turn subrogated to the rights of the employer and may recover its loss from the driver Gilbert.

Point 2 of that theory is that the Ohio Casualty policy does not cover Gilbert personally, but that the United Pacific policy does cover Gilbert personally; therefore, we will now step to the end of this chain of events and fix the ultimate liability in this case on the United Pacific by reason of this theory of subrogation.

Am I correct in my statement of your theory?

Mr. Stanbury: Very well stated.

Mr. Brown: Now, at that, I think we have reached the point, your Honor, where we can talk about that for a few moments.

If that theory fails, then there leaves nothing but the conceded double insurance in this case, and the two companies will prorate this liability or loss either on a 50-50 basis or such basis—we contend five-sevenths and [40] two-sevenths—or such basis as your Honor decides. But first we must dispose of this theory of subrogation. I would like to discuss that for just a few minutes.

First, we feel that the Ohio Casualty policy covers Gilbert. There are three reasons. One is that the "extended coverage clause" of the Ohio Casualty policy provides substantially that any person driving a motor vehicle covered by the policy is protected, provided the permission is there, if it is an owned automobile.

Here is the point where we feel that Section 383.5 is of the utmost importance. The statute takes care of that issue here and says that McKeon and Page are the owners for the purpose of insurance, and concludes with a recital of why it was passed, to prevent fraud or mistake. That is reason No. 1.

Therefore, this accident vehicle, within the meaning of Section 383.5, is a motor vehicle owned by the insured named in the Ohio Casualty policy. The statute says so in very, very plain language, concluding with the recital of why it was passed, giving its purpose.

That, I feel, disposes of the point that Gilbert's liability was not personally covered under the Ohio Casualty policy. Point 2. To rebut that theory, the certificate of insurance does not limit the description of risk to automobiles owned in the name of the named insured. It goes [41] further and adds the words "or operated."

It is stipulated and conceded in this case that for one year the accident vehicle had been operated in the business of the insured named in the Ohio Casualty policy. We feel that the certificate of insurance supersedes and takes the place of any conflicting language in the body of the policy. For that reason, also, Gilbert personally was insured under the Ohio Casualty policy.

Point No. 3 is that by operation of law in California, under the aggregate partnership theory, George Page was owner of that vehicle and he is named in the Ohio Casualty policy. Each partner owns what the other contributed to the conduct of the partnership enterprise. California does not follow the entity theory in partnership.

A fine treatise was written on that point in the case we have cited in our briefs. The case there goes to the trouble of going back and discussing the various theories of the law, civil law and all others.

The next point is that, in all fairness, here we have the two companies covering certain hazards. The hazard that occurred is more specifically covered by the Ohio Casualty policy, for the reason that the accident out of which all of this liability arose occurred on the business of the insured described in the Ohio Casualty policy.

The United Pacific policy covered Mr. Page, individually, [42] and doing business under the fictitious name not involved in this controversy; but the Ohio Casualty policy covered McKeon and Page in Pacific Dry Cleaners and it was in that business that the liability or lawsuit arose. As your Honor has, of course, found already, and correctly so, that Page as an owner of the vehicle, yes; he has that vicarious statutory liability, but certainly that is not an exclusive liability.

The Court: Well, it would not matter anyway, would it?

Mr. Brown: No.

The Court: If Ohio Casualty is subrogated through Gilbert to sue United Pacific, then by the same process of reasoning would not United Pacific be subrogated to Page to sue the partnership, and hence compel Ohio Casualty to respond to the partnership?

Mr. Brown: That is right.

The Court: It being an agent of the partnership who committed the tort?

Mr. Brown: That is right; the theory works both ways.

The Court: I have not been able to see that it would not work both ways.

Mr. Brown: It certainly does work both ways.

In the Consolidated Shippers case—I know your Honor is familiar with it by now—I have gone and secured the briefs of the parties in that case. The very theory that the [43] Ohio Casualty relies on in this case was argued at length and was before the court in that case, and was rejected for this reason: It was argued there that Harvey—the man's name was Harvey who holds the corresponding position to Gilbert in this case—it was argued that Harvey had the primary liability, and that if Pacific Company in that case paid, it would be entitled to subrogate through its insured and, therefore, reach the other policy—the identical theory that is being advanced here—but the court considered that and rejected it.

I am now looking at the brief in the District Court of Appeals filed by one of counsel, Kenneth J. Murphy, beginning at page 57. He takes up this same argument that is being advanced in this case.

Since Consolidated Shippers was only vicariously and secondarily liable, and since the Pacific policy is excess insurance only, Consolidated Shippers is now subrogated by virtue of such payment to plaintiff to the rights of the plaintiff in the Arizona action.

Furthermore, the Commercial policy expressly provides that its coverage was to extend to Consolidated Shippers, which is on all fours with our proposition here.

And then he quotes the provision from the policy.

Since Consolidated Shippers is subrogated to the benefits of the Commercial policy, if Pacific paid all or a part [44] of said sum to Consolidated, Pacific would be subrogated pro tanto to the benefit of the Commercial policy —the identical theory being advanced by the Ohio Casualty here.

I point out that this question was argued before the court to show that it was considered, because the opinion is not any too satisfactory upon all points that were argued.

Now turning to the opinion, here is how the court disposed of that:

> "Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and we know of no law in this state fixing degrees of liability in relation to the joint liability for torts. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone"—

citing Schilling v. Central California Traction Co.—

> "or against both jointly, it would seem that there could be no such thing as primary and secondary

> liability. Moreover, the court made no finding on the issue of primary and secondary liability as between Harvey and plaintiff, and in fact made no finding concerning the relationship existing between Harvey [45] and plaintiff out of which the latter's liability arose. In view of our conclusion that both policies insured the same risk so far as plaintiff is concerned, the fact that plaintiff's liability may have been primary or secondary becomes immaterial. * * *"

How does that apply in this case? Let us go now to the action for damages pending in the State Court in San Luis Obispo. Mr. Page is named as the first defendant, because he is owner of the accident vehicle; McKeon and Page are named as the second defendant, because it was out of their business operations that the accident arose, their employee was driving the truck; Gilbert, the employee, was named as the third defendant. Those are the three defendants against whom recovery is sought.

Gilbert, for reasons unknown to me, left the State of California. He has not been served. Therefore, we have two defendants in the action for damages in the State Court in San Luis Obispo County.

One is Mr. Page. Why? Because his liability is predicated on the ownership statute. It is vicarious liability.

Two, McKeon and Page, because that co-partnership was the employer of Gilbert. Mr. Gilbert is no one in the picture.

Now, then, the plaintiff—the plaintiffs—there are two of them in that action for damages, are not obliged to [46] elect. They can pursue anyone legally responsible for their injuries and damages. They certainly do not have to pursue Mr. Gilbert beyond the limits of the State of California. They certainly do not have to elect to

pursue Mr. Page. If so, his limit of liability would be $10,000. They would not get enough money.

As the court points out here, there isn't any such thing as degree of liability in tort actions. If they are liable in tort, they are liable in tort and the injured party may sue and recover from the person that he finds within the jurisdiction of the court.

This argument that because only United Pacific policy covered Gilbert's liability personally, and the Ohio Casualty policy did not cover that liability personally, then that the Ohio Casualty, before it can follow all around and come back over here and say to Mr. United Pacific, "This is all your liability because we can subrogate," that was fairly considered and rejected herein the Consolidated Shippers case.

And we have stipulated and agreed and, of course, your Honor knows, without us having done it that the law of California applies to this case, because both policies were issued in California; it is a California matter so far as the substantive law is correct and there is no dispute to the contrary in this state. The court there rejected that doctrine, [47] rejected that argument, the same theory of the case that is being presented here today, upon that one ground that they say we know of no California case that fixes degrees of liability as between joint tort feasors, and certainly there isn't any.

It certainly would be unfair to require any plaintiff to elect as between two or more or among several joint tort feasors as to whom he should recover from. Therefore, in this case the entire theory must fall.

There are three reasons, as there, why the Ohio Casualty policy covers Gilbert personally. The statute says the persons named in that policy were the owners of that

vehicle. That statute was passed specifically to cover insurance contracts covering motor vehicles.

Two. The certificate of insurance specifically says that it covers or its description of risk covers all automobiles owned or operated, not owned and operated, but owned or operated. That certificate of insurance was placed on this policy subsequent to the issuance of the policy and, of course, takes precedence.

The Court: Where is that, now?

Mr. Brown: That is page 5 of Exhibit B, your Honor.

Mr. Stanbury: May I call attention to one thing by way of interruption, your Honor?

The Court: Yes. [48]

Mr. Stanbury: If you will study that, you will notice that it was issued for a special operation, not issued for the insured but the camp post exchange, Camp Cooke, California. It is a certificate of insurance issued to an outfit, and there is nothing to show this man was on any activities for Camp Cooke or under that certificate, and I think we probably can agree that he was not, for that matter.

The Court: Doesn't the certificate constitute an admission by Ohio Casualty Company?

Mr. Stanbury: It is a representation to somebody who might be secondarily liable, your Honor, for example, a camp post exchange, what it was covering as far as it is concerned. I do not believe it vitiates any other claim in connection with these parties. It shows what the parties understood.

The Court: You are referring now to the first sentence of the intended coverage?

Mr. Stanbury: Yes, sir. I am referring to the whole policy and to the certificate as being what it shows itself on its face to be, a representation to someone else.

The Court: It would only be important here if it served to modify the first paragraph of the extended coverage clause?

Mr. Stanbury: That is right. Yes, sir; that is correct.

Mr. Brown: We feel, your Honor, that the best evidence [49] of what the policy really means is what the company said the policy meant at a time subsequent to its issuance.

The Court: If Gilbert is an additional assured of United Pacific's policy, and not of Ohio's, do you agree with Mr. Stanbury's argument with respect to subrogation?

Mr. Brown: No, your Honor. That does not dispose of the case. The statutes must be read and taken into consideration. There is a statute which says what double insurance is. We feel, regardless of the coverage as to Gilbert personally, that there is double insurance, because the statute controls. The statute defines double insurance.

The Court: What constitutes double insurance?

> "A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest."

Mr. Brown: Whitch means that both parties must pay.

The Court: Must pay what?

Mr. Brown: The liability or loss that comes up.

The Court: In what proportion?

Mr. Brown: That is the next question.

The Court: The statute does not say?

Mr. Brown: The statute does not say in what proportion. That is the most difficult one to argue.

The Court: Will the statute modify the rules of subrogation? [50]

Mr. Brown: In dealing with insurance contracts?

The Court: Yes.

Mr. Brown: I believe that it will.

The Court: In other words, your argument is that policies are issued subject to the Code provisions, the Insurance Code?

Mr. Brown: Precisely, your Honor; in fact, each policy.

The Court: If there is double insurance within the meaning of Section 590 of the Insurance Code, then there is double liability, that is, there is liability of both insurers fixed by the Code.

Mr. Brown: Fixed by the Code.

The Court: Where is that liability fixed?

Mr. Brown: That is a problem that your Honor will have in this case. I undertook to answer it on the Belt Casualty case, the Lamb v. Belt Casualty case, which we cited in our brief and which is the last authority discussed. The court there said: "* * * that the liability thereunder shall be that proportion of the total liability which the limits of the policy bear to the whole amount of such collectible insurance."

Now, in this case, as applicable to one person the Ohio Casualty provides $25,000; the United Pacific, as applicable to one person, provides $10,000. There then is insurance protection of $35,000. And if the companies are to share liability in accordance with the limits stated in [51] their policies, as held by the court in Lamb v. Belt Casualty, then it would seem to me that we would take $35,000 and then take 10/35ths, which is 2/7ths, and 25/35ths, which is 5/7ths, and that is where the liability falls.

There is no reason to say it is a 50-50 proposition, because the policies are issued in different amounts.

The Court: Isn't the situation this with respect to this accident and to the legal problems of the liability to which the insurers are called upon to respond here, laying aside this Gilbert argument, that there has been a subrogation? There is a joint liability of both insurers up to $10,000. Is there any reason why that should not be shared equally, the $10,000?

Mr. Brown: Yes. The policies say, each of them in its "other insurance" clause, each of the contracts tries to decide that, but those other insurance policies do not quite fit this case.

The Court: If you are referring to the policy limits, couldn't you argue just as well that, for the purpose of this case, the limits of the policy of United Pacific is $10,000?

Mr. Brown: As to one person—oh, I see, under the vicarious liability law. Yes; we could argue that it is $5,000 for injuries to one man in that year.

The Court: There is no necessity of talking about injuries to one person. There are two people injured here, [52] aren't there?

Mr. Brown: One is injured seriously and the other only superficially.

The Court: Well, that is immaterial, isn't it? Two people are injured?

Mr. Brown: Two people are injured.

The Court: So the limit is $10,000 under the facts stipulated here?

Mr. Brown: That is right.

The Court: United Pacific covers that liability up to $10,000; Ohio Casualty also covers that liability up to $10,000 a year?

Mr. Brown: A year.

The Court: The limits of the policy.

Mr. Brown: Yes.

The Court: Is there any reason why both should not be jointly responsible up to $10,000? The policy limits are not called in question, are they?

Mr. Brown: No; they are not.

The Court: Because the double coverage is well within the limits of both policies, isn't it?

Mr. Brown: It is well within the limits.

The Court: So why should the policy limits cover?

Mr. Brown: I was following the decision of Lamb v. Belt Casualty. In that case one of the policy limits, as I [53] recall, was $10,000 and $100,000, and the other was $5,000 and $10,000; and the court stated there—I have covered that at the very end of the brief, where I gave quite a little thought to that, and we feel that the court there did follow the rule that the liability of the company should be apportioned in accordance with the limits of the policy; and that is the only reason that I have advanced the argument here. I have gotten it from the Belt Casualty case.

The Court: Is there any objection to resuming at 1:30, gentlemen?

Mr. Stanbury: None at all, your Honor. We will finish this case today, I take it?

The Court: Yes. Court will be in recess until 1:30.

(Whereupon, a recess was taken until 1:30 o'clock P. M. of the same day, Friday, June 13, 1947.) [54]

Los Angeles, California, Friday, June 13, 1947, 1:30 P. M.

The Court: Let me hear from Mr. Stanbury on the Gilbert situation.

Mr. Stanbury: Yes, your Honor. Your Honor, the point that I make is very definitely stated in my first brief.

The Court: Let me ask you, if I may?

Mr. Stanbury: Yes.

The Court: As I understand your point it is that Gilbert is an assured of the United Pacific policy?

Mr. Stanbury: Yes, your Honor.

The Court: Gilbert is not an assured under the Ohio Casualty policy; that the employer of Gilbert is compelled to respond and the employer of Gilbert may sue Gilbert?

Mr. Stanbury: Yes, sir.

The Court: To recover the damages caused to the employer through Gilbert's neglect; and that if it secured a judgment against Gilbert, the United Pacific would be compelled to respond?

Mr. Stanbury: Yes, sir.

The Court: But isn't there one gap lacking in that chain? Before United Pacific would be compelled to respond, it would have to be for a loss which United Pacific had agreed to indemnify him against?

Mr. Stanbury: That is correct. [55]

The Court: And he could only be liable—or, rather, United Pacific could only be liable, couldn't it, if the basis of the claim under the policy were that Gilbert had a claim back against the claim assured paid?

Mr. Stanbury: No, sir; I disagree with that, your Honor. Gilbert is admittedly an assured of the United Pacific. That is stipulated. They agreed to that.

Therefore, Gilbert has rights under that policy as an additional assured, there isn't any question about that.

The Court: All right; let us assume that.

Mr. Stanbury: All right.

The Court: And what does the policy cover?

Mr. Stanbury: It covers any loss that Gilbert sustains as the car driver, that is, any liability imposed upon him.

The Court: Does it cover Gilbert's liability to his employer?

Mr. Stanbury: It covers his liability to anybody whatsoever, your Honor, because it does not specify. It is a policy to indemnify the assured against loss sustained through any activity. This being comprehensive, if it were the automobile, it would be damage to an automobile. It is a situation that is exactly the same—and I stand square-footed on this proposition and I am satisfied I am on solid ground—it is exactly the same as if Gilbert had a third insurance policy here in another company and he ran over a child or in any other way incurred a liability, his [56] company would have to indemnify him. United Pacific is that company.

Now, I grant that there is a link missing here unless, in the discretion of the court, the court decides to bridge it, because this is an action in which the parties want their rights completely declared and there is authority for your Honor jumping that gap.

The gap would be that, technically, the United Pacific would be entitled to sit back and say, "We will not pay until our assured, our admitted assured, Gilbert's liability has been established by Judgment." They have that right. They could do the same thing here if they wished and say, "We won't pay any claim until our named as-

sured has had a judgment against him." And so could the Ohio Casualty do likewise.

But in this case it is admitted—it is in a written stipulation—our very presence here proves that the fact that would be established by a judgment against Gilbert does exist, namely, Gilbert did cause this accident through culpable negligence. And it is an idle act to say to Ohio Casualty Company, as the subrogee of this named assured, "You first go to Nebraska, serve Gilbert, and get a judgment against Gilbert, and then we will have to admit what we now admit, anyway, namely, that our assured Gilbert caused this loss." [57]

The Court: All right. Let us assume that Ohio Casualty is subrogated to the rights of the employer against the employee and that the employee is an additional assured under the policy issued to Page by United Pacific. United Pacific is compelled to pay, compelled to pay first on account of Page, isn't it?

Mr. Stanbury: I do not know which would be first there paying off. They have got a named additional assured.

The Court: All right. They are compelled to pay on account of Page on this accident because Page is sued, isn't he?

Mr. Stanbury: That is right.

The Court: They are subrogated to Page's rights. An agent of the partnership, for whom the partnership is liable, caused the loss to Page; so United Pacific would have a cause of action, would it not, subrogated to the claim of Page against the partnership, for which Ohio Casualty Company would be called upon to respond?

Mr. Stanbury: No, sir. That, if your Honor please, is confusing the two issues, I think. As between the

named assureds I grant and concede, for any cause of action I have before the court or right now at San Luis Obispo, if your Honor does not care to take up the Gilbert matter, which I think should be taken up—

The Court: Let us take it up. Let us plot it. [58]

Mr. Stanbury: What is that?

The Court: Let us plot this thing. That is the way to do it.

Mr. Stanbury: All right.

The Court: Suppose this court says: There is coverage here by both parties, by both insurance companies, up to $10,000 and that they shall each contribute one-half that amount. The United Pacific pays $5,000, the Ohio Casualty pays $5,000; so their loss, each is $5,000, obviously, isn't it?

Mr. Stanbury: Yes, sir.

The Court: So Ohio Casualty says: We are insurance carrier for the employer for the employee's negligence, we are subrogated to the rights of the employer so we sue the employee. You sue the employee. You procure a judgment and then sue the United Pacific on that judgment. Meanwhile United Pacific's counsel is at work and says, "Well, we have paid out $5,000 on behalf of our assured Page. This partnership was using Page's automobile. The negligence of the partnership's employee caused our loss. The partnership is responsible for the negligence of the employee and we are subrogated to Page's rights. We sue the partnership and recover a judgment against the partnership for the negligence of its employee and sue Ohio Casualty on that judgment. Don't you end up just where you were? [59]

Mr. Stanbury: No. I will tell you why we do not, your Honor. Because at the bottom of the pile every step

of the way is Gilbert. If they were a subrogee against the Ohio Casualty Company for a loss imputed by Gilbert, they would have to either collect from Gilbert or from Gilbert's insurer, and they are right back in their own pockets. That is the answer.

The Court: Let us assume for the moment that that could be true if you had jurisdiction over Gilbert and could procure a judgment against Gilbert. But the judgment that you are going to call upon United Pacific to pay is a judgment against Page, isn't it?

Mr. Stanbury: That is right.

The Court: All right. Now, they are subrogated clearly to Page's rights, aren't they? Isn't that partnership liable to Page as owner of that vehicle for the damage caused him through the negligence of its agent?

Mr. Stanbury: Your Honor, I do not believe so. I sincerely do not believe so.

Now, I did not intend to join issue on that matter, because I tried to keep the issues as narrow as I could here. I do not believe that one partner can sue a partnership of which he is a member for damages; and I believe that is the import of the case in 45 Cal. App. (2d), which is not the Consolidated Shippers, but Park v. Union Mfg. Co., 45 Cal. App. [60] (2d), cited by United here, because the partnership liability is joint and several. And I don't think they could—

The Court: Upon an accounting, upon an accounting. However, the form of remedy is there—

Mr. Stanbury: Let us concede it for the moment, your Honor. Let us concede—

The Court: —because, would not Ohio Casualty stand to pay the partnership whatever the partnership was out?

Mr. Stanbury: That is correct.

The Court: And the question would be: Could Page recover from the partnership?

Mr. Stanbury: Well, your Honor, suppose he could. The partnership turns right around and collects from Gilbert. That is the overwhelming point that I have to keep insisting on. At the bottom of every automobile accident for which anyone has to pay there exists the original basic tort feasor.

The Court: But you are liable to have the dog chasing his tail here. There is only $5,000.00 on either side.

Mr. Stanbury: No, sir; not as to Gilbert, your Honor.

The Court: Your company is out $5,000—correct?

Mr. Stanbury: My company is out $5,000 for—

The Court: In the San Luis Obispo County action, suppose it is $10,000?

Mr. Stanbury: Yes, sir; that is correct.

The Court: All right; United Pacific is out $5,000. [61]

Mr. Stanbury: That is right.

The Court: Your company tries to recover from United Pacific $5,000 through its subrogation to the partnership and a claim through Gilbert at the same time.

Mr. Stanbury: That is right. They can't claim through Gilbert.

The Court: No. Your company is claiming through Gilbert.

Mr. Stanbury: That is right.

The Court: Ohio Casualty.

Mr. Stanbury: Yes, sir.

The Court: At the same time, in this chess game or military maneuvering, probably more correctly, the forces of United Pacific take out and, through Page against the

partnership, to recover their $5,000, recoup their $5,000 from Ohio Casualty.

Mr. Stanbury: That is right.

The Court: And if you did not meet head-on along the way, to avoid a plurality of actions in a court of equity would you not end up by being at a great deal of litigation and each of you satisfying and collecting a judgment for $5,000?

Mr. Stanbury: No, sir. I am satisfied that I can demonstrate the contrary. Does the court have any objection to my charting it on this blackboard?

The Court: No. I think it is helpful to graph it.

Mr. Stanbury: I think we can do it off-hand here. [62]

The Court: Bear in mind that you do not have any judgment against Gilbert.

Mr. Stanbury: I know that, your Honor. I grant this court in every way is empowered to say to go to Nebraska and get another judgment.

The Court: No, no. I mean by that, if United Pacific comes and pays, it is going to pay for the account of Page, and not for the account of Gilbert.

Mr. Stanbury: Well, that is correct up there; that is right. Unless we take the broad vision and say we are looking to end this chain of litigation completely, that is right; we are going to have to settle up 50-50 at San Luis Obispo.

(Diagramming on blackboard): We have United Pacific, and all its rights and obligations are traced through Page and Page dba Mission.

The Court: Why don't you just leave Mission out of it, if it will help any?

Mr. Stanbury: All right.

The Court: Let us just take Page.

Mr. Stanbury: All right. Then Ohio Casualty—

The Court: Unless you think it helps.

Mr. Stanbury: Well, I think it won't hurt any; it won't confuse anything.

The Court: All right.

Mr. Stanbury: Then we have Ohio Casualty and McKeon and [63] Page, and here I do not need Mission but I will put it in to be consistent.

The Court: Is that the same Mission that is in the other one?

Mr. Stanbury: No; it is Pacific. It should be "dba Pacific." Then we have down here where both parties are liable for what he did. We have Gilbert, and then through Gilbert we have these people who are named—what is their name?

Mr. Brown: Echols.

Mr. Stanbury: Echols, all right.

The Court: Now, wait just a minute. That won't do because Gilbert's liability in that chain is the same as McKeon and Page's liability.

Mr. Stanbury: Well, I will put an arrow up to here. It is a joint and several liability all the way around; so I will make the arrows run everywhere they ought to. Echols can by-pass Gilbert if they want to.

In other words, Gilbert is liable to everybody here after certain conditions precedent are satisfied, that is, for a judgment as obtained against him. These people do not have to sue him; they can by-pass him. And both the owner's liability and both the liability of Page here and the United Pacific, as an owner, and ours as a principal, is both direct and primary as to everybody but Gilbert. [64]

The Court: Echols has in effect by-passed Gilbert, hasn't he?

Mr. Stanbury: That is right; and they can.

The Court: All right; that is $5,000 each.

Mr. Stanbury: Yes, sir.

The Court: $5,000 against Page and $5,000 against McKeon and Page?

Mr. Stanbury: Yes. Now, if we assume—I am not certain I am right on this; I may be wrong—if we assume that McKeon and Page can sue through an accounting or something else, and maybe they can, then we have a liability running over here in favor of Page and Page, but I am trying to—

The Court: There is only one Page, isn't there?

Mr. Stanbury: There is only one Page. But let us take Mission out. Just as the court said in the first place, it is confusing to have them in there. Just Page and Page and McKeon of McKeon and Page.

The Court: All right. Then Page could recover, at most, under that assumption $2,500, because he would be suing himself.

Mr. Stanbury: That is all. One company would pay half of it. What I am trying to do now—and I am thinking as I go along, because I had not planned a diagram—I am trying to put an arrow in here pointing a liability. The arrow head [65] points liability to everybody who has any claim against anybody else here. I think I have it.

We are assuming Page can sue or get an accounting.

The Court : We have to have a liability from Gilbert up to United Pacific.

Mr. Stanbury: That is right; we have to have that up there. We also have to have one from Gilbert up to McKeon and Page.

The Court: Not Gilbert to Page, now; from Gilbert direct to United Pacific, because it does not go through Page, does it? If it were through Page, that would make a different story.

Mr. Stanbury: No. These are subrogators and they only can trace through their assureds, but I will show a direct liability here.

The Court: Because Gilbert is a "named assured" or is an additional assured of United Pacific—correct?

Mr. Stanbury: That is right; and therefore I can't put this arrow in here.

The Court: I think you can. You can't put it through Page, but you can put it direct from Gilbert through United Pacific, can't you?

Mr. Stanbury: Yes, but they insure Gilbert.

The Court: You are leaving out the insurance for a moment. [66]

Mr. Stanbury: When your Honor asked me to put an arrow straight up to United Pacific and I did it, I overlooked the fact that United Pacific, since it insures Gilbert, has a liability to Gilbert but Gilbert is not liable to reimburse or permit a recoupment by his insurers.

The Court: Yes; that is what I intended the arrow to be. You probably have the point wrong.

Mr. Stanbury: My point should be the other way. All right. And then, of course, there are reciprocal arrows that must come down from Ohio to Gilbert and the reciprocal arrow—there is one already from McKeon and Page. And just as we have the same thing from United Pacific, we also have a right of subrogation through Ohio Casualty when the losses occurred.

The Court: Ohio Casualty recovers from Gilbert?

Mr. Stanbury: That is right.

The Court: The Echols recover from McKeon and Page, recover from Ohio Casualty through McKeon and Page.

Mr. Stanbury: That is right. Both these companies, as I see it, are in the same position regarding subrogation, except with the United Pacific insuring Gilbert and Ohio not insuring Gilbert, United Pacific obviously cannot recover back from Gilbert nor an insurer be subrogated against his insured.

The Court: Should we not reverse the arrow between [67] United Pacific to lead up in the first instance?

Mr. Stanbury: That is right.

The Court: When we start back the other way let us use a snake line.

Mr. Stanbury: All right, that is right. Have I got any that are wrong now?

The Court: Well, that one from United Pacific down to Gilbert.

Mr. Stanbury: Yes. What is that snake line to indicate?

The Court: Let us see what we have up to this point. You have from Echols to Page through United Pacific, don't you?

Mr. Stanbury: Yes, sir.

The Court: That is the original recovery?

Mr. Stanbury: That is right.

The Court: From Echols through McKeon and Page to Ohio Casualty.

Mr. Stanbury: Yes, sir.

The Court: They by-pass Gilbert, so that line from Echols to Gilbert goes out, doesn't it?

Mr. Stanbury: Yes, except that my lines are supposed to show every conceivable liability here. As the thing now stands, that is just exactly right; that has happened.

The Court: That is what our situation is, isn't it?

Mr. Stanbury: That is right. And then we will have to take some other arrows out, because we do not have any actions [68] pending now.

The Court: Let us take those intermediary arrows out for the moment.

Mr. Stanbury: All right. This clarifies it very much, and this comes out.

The Court: Now you are going to have a different kind of arrow. This is the subrogation arrow that goes from Ohio Casualty through McKeon and Page to Gilbert, doesn't it?

Mr. Stanbury: Yes; it does.

The Court: To Gilbert, and from Gilbert direct to United Pacific.

Mr. Stanbury: Yes, sir.

The Court: Not through Page but direct to United Pacific.

Mr. Stanbury: Yes, sir. Now, the point that I am making, your Honor, is that no suit can be diagramed or outlined between anybody here who has any right to sue anybody else, on this board, that won't wind up on Gilbert.

The Court: All right. Let us now assume for the purpose of this discussion that after United has paid out $5,000 and Ohio Casualty has paid out $5,000 to Echols, they set about to recoup whatever they can recoup. Ohio Casualty is claiming a right of subrogation of McKeon and Page through Gilbert; we are assuming jurisdiction all the way through wherever they have to go; they sue him, recover [69] a judgment, and sue United Pacific on that judgment.

Mr. Stanbury: Yes, sir.

The Court: All right; there is one. So Ohio Casualty at the moment appears in the prospect of recouping the $5,000, doesn't it?

Mr. Stanbury: Yes.

The Court: United Pacific is not idle. What can United Pacific do? They set out that they paid $5,000 out for the account of their assured Page. They are subrogated to what claim Page may have to the extent of $5,000.

Mr. Stanbury: They are.

The Court: Any claim.

Mr. Stanbury: That is right; they are.

The Court: They stand in Page's shoes to the extent of $5,000.

Mr. Stanbury: Yes, sir.

The Court: So they sue the partnership as claiming subrogation to Page's rights against the partnership, upon the theory that an agent of the partnership caused the loss of Page. Now, how much can Page recover from the partnership, $2500?

Mr. Stanbury: Let us say that; yes, sir.

The Court: All right. Then United Pacific recovers from McKeon and Page $2,500 for which Ohio Casualty is compelled to respond. [70]

Mr. Stanbury: Yes, sir.

The Court: So the net result is that United is out $7,500 and Ohio Casualty is out $2,500.

Mr. Stanbury: Up to this point, absolutely.

The Court: All right. Now, where do we go from there?

Mr. Stanbury: We go from here: Every time United Pacific throws a loss on Ohio as a result of what Gilbert did, we get after Gilbert, if he is uninsured, or against

whoever insured him, whether it be General Accident, Pacific Indemnity or whoever it is. And when we do that in this case we find we are back with our friend United Pacific. This is the bottom and end of every circle we start on, your Honor. It is true, if we forget that Gilbert is the bottom, every tort claim, every loss is going to sink until it gets down to this line below the exhibit. We can go around and around.

But here are actions inter se, because United traces through Page, he traces through McKeon and Page, and both of them have an absolute cause of action against Gilbert. But, unfortunately for the United Pacific, it happens to be Gilbert's fire boom.

The Court: Your answer to that is that Ohio Casualty, even if compelled to pay the claim of Page against McKeon and Page or United as subrogee of the claim, that the Ohio Casualty can turn right around and be subrogated to the [71] rights of McKeon and Page against Gilbert for that loss, and, recovering a judgment against Gilbert, United Pacific would be called upon to respond within the limits of their liability to Gilbert, that is, within the limits of the $10,000 liability?

Mr. Stanbury: That is exactly it. In other words, if we stop with Page suing McKeon and Page—and we don't—while we are chasing Gilbert, if we allow ourselves to be open to execution, we have paid off United Pacific on what McKeon and Page did to Page.

The Court: Under that theory, then, I was in error in my last statement. As insurer of Gilbert, the only limit of liability of United Pacific would be the limits of the policy.

Mr. Stanbury: Limits of the policy.

The Court: I was referring to the statutory limits.

Mr. Stanbury: Yes; that is right. In other words, momentarily the parties will be as they are up in San Luis Obispo, cut right across the middle of the litigation.

We would not yet have had time to chase Gilbert, any more than we have now. And my argument why in this action for declaratory relief we should go to the end of the line now is to avoid that very circuit whereby both of these insurers, through their respective insureds, discharge their original present liability to Echols, and then Ohio Casualty, through McKeon and Page, have to sue Gilbert and then sue [72] United Pacific.

Your Honor has the authority to make that circuity of action, with the loss of money in attorneys' fees and the wasted efforts unnecessary right now by looking at reality here.

I have cited your Honor one Washington case which holds that it is not necessary, under certain facts, although the policy says the judgment shall first be obtained against the assured, that a judgment be obtained; and that finding was made upon the grounds that the evidence showed the settlement made by the assured was a proper and advisable settlement based upon a legal liability, even though it had not been reduced to judgment.

In this case we have stipulated in writing, and, if we had not, the implication would be there inescapably, that this was the man responsible for every loss anybody on this board is going to have; and, to say, "Well, although United Pacific concedes it right here in this action for declaratory relief, nevertheless, Ohio Casualty should pay out money to Echols, go to Nebraska to get a judgment against Gilbert, and then on that judgment sue United Pacific" is a terrible circuity of action.

The Court: What you are saying, though, laying aside those equitable considerations of court procedure,

the effect of your argument is, isn't it, that anything that Echols may [73] recover by reason of Gilbert's conduct, to the extent of the limits of United Pacific's policy, United Pacific must respond to it.

Mr. Stanbury: That is right.

The Court: On the theory that anything within the limits of United Pacific's policy Ohio Casualty may recoup on the theory that they are subrogated to the employer's rights against the negligent employee who, in turn, is insured within the limits of the policy of United Pacific?

Mr. Stanbury: That is exactly it.

The Court: So the crucial question is: Is Gilbert also insured with Ohio Casualty?

Mr. Stanbury: Yes, sir; that is the crucial question in this case, because, as we concede that up at San Luis Obispo, we have a joint liability up to twice the minor policy.

The Court: Under your theory also, then, there are two recoveries here as to the full extent of United's policy—

Mr. Stanbury: As to the two main assureds that is right.

The Court: Yes. Of course, I am assuming your contention with respect to Gilbert.

Mr. Stanbury: Yes, sir.

The Court: With respect to the partnership of McKeon and Page and with respect to the Ohio Casualty, coverage of the employer, you say? [74]

Mr. Stanbury: Yes, sir.

The Court: And with respect to United Pacific's coverage of the employee, it is your contention that there is a duplicate insurance here, double coverage, a coverage by both the insurance companies, United Pacific and Ohio

Casualty, to the extent of the maximum limits of United Pacific's policy?

Mr. Stanbury: Yes, sir.

The Court: What do you say to that, Mr. Brown? I do not care to have you repeat what you said with respect to Gilbert being an additional assured of Ohio Casualty's policy, unless you have something further to add.

Mr. Brown: Not at the moment, I do not, on that point.

The Court: But with respect to the route of liability here.

Mr. Brown: There is one thing that concerns me about it, your Honor. We are trying Gilbert here and I am wondering if we should. We have been talking all day about Gilbert.

The Court: How can you escape talking about Gilbert as long as you concede that the employer has a claim against the negligent employee for the damage which the negligent employee causes?

Mr. Brown: Here is the reason: Mr. Gilbert is a stranger to this controversy. Mr. Gilbert is not in the State of California.

The Court: I do not think that would matter. [75]

Mr. Brown: Well, I am wondering if it does. I am not taking an affirmative. That is a question.

The Court: If you take that position, that because we have no jurisdiction over Gilbert, then it might end up that this court would have no jurisdiction to determine this controversy. I am beginning to wonder whether the court can bridge all those gaps.

Mr. Brown: So am I, your Honor.

The Court: And give you a decree here.

Mr. Brown: I am wondering if we can decide it.

I am wondering also if the court will not probably feel that the same result should be reached that was reached in Consolidated Shippers. The same thing was argued there as here today. The court disposed of it there by holding and stating that we can't require an injured man to elect as to which of the one or two or more joint tort feasors he will pursue. No rule requires him to do that. We have to take the case as it exists. We can't say to an injured man, "You must sue the employee." He may sue the employee; he may look to anyone legally responsible to him for what happened.

The Court: That is very true.

Mr. Brown: That is the way it was disposed of in the Consolidated Shippers case.

The Court: How does that help you gentlemen to ultimately dispose of your controversy? The court could rule today that, [76] so far as the immediate controversy is concerned, both of you should undertake a joint defense of the action in San Luis Obispo County, but that really would not settle anything, would it?

Mr. Brown: We are here to have it all settled.

The Court: You are not asking for cost of attorneys' fees in that action?

Mr. Brown: No; we are not, your Honor. We are here to have the entire controversy settled.

The Court: Then must not the court look down the road, so to speak, and down the channel of time and see what will ultimately happen?

Mr. Brown: My answer to that is just what happened in the Consolidated Shippers case. The court there was asked to look, just like your Honor is being asked to look here today. And I will be most happy if your Honor would look at the briefs that were written in that to see how it was argued there, just precisely as it is argued here.

The Court: Was that the situation there?

Mr. Stanbury: No.

Mr. Brown: Harvey there stood in the same place as Gilbert stands here.

The Court: What about the carriers, the insurance carriers? Where did they stand with respect to Harvey? That is the question, isn't it? [77]

Mr. Brown: They stood in the same relative positions almost.

The Court: If the court determines that Gilbert is an additional assured of the Ohio Casualty's policy, then it seems to me that we would arrive at this stage where, as you argue in effect, that both insurers have covered this accident to the extent of the limits of their policies and it would be a question of prorating the liability. But, is not the crucial question: Was Gilbert an additional assured of the Ohio Casualty's policy?

Mr. Brown: We are borrowing trouble that we do not need to borrow.

The Court: How can we escape it?

Mr. Brown: We can escape it by treating it just as the court did in Consolidated Shippers case. Pacific Employers there argued just as Ohio Casualty is arguing here, that whatever it paid on behalf of Harvey because it had insured Consolidated Shippers, it could recover from Harvey and, therefore, from Pacific Indemnity, Harvey's insurer, and the court rejected that.

Mr. Stanbury: If I may interrupt at that point, your Honor, Consolidated Shippers did not have this question before the court in any way whatever. It was a question of two companies insuring the same plaintiff, one as an additional assured under Harvey's policy, one direct. It is not an [78] action for declaratory relief nor for subrogation. It is exactly as if both assureds were with the

same company here, were suing the company—no; that is wrong. It is as if these assureds were suing these companies and the companies, between themselves, without any subrogation action, without any declaratory relief action whatever, were trying to avoid the obligation which we both admit having in San Luis Obispo. That is why I said in my second brief their argument here is exactly opposite from what it is on the other phase of the same problem. Ohio could make the same argument. We contend we are joint up at San Luis Obispo, and that is your Consolidated Shippers case. The immediate liability up there has nothing to do with subrogation whatsoever; it is not involved in any way whatever. After the court gets through with that Consolidated Shippers, the insurance company for the employer could turn right around and sue that driver and collect from his insurance company.

The Court: There is no limitation, is there, Mr. Brown, except the policy limitation—there is no statutory limitation upon the liability of Gilbert, is there?

Mr. Brown: None whatsoever.

The Court: So your coverage of Gilbert is to the extent of the limits of the policy?

Mr. Brown: That is right.

The Court: Hence your coverage so far as Echols is [79] concerned is, again, the limits of the policy.

Mr. Brown: Yes. We are talking here, and at one point a matter of fact should be corrected or stipulated, that we cover Gilbert subject to the limitations contained in the policy, and one of them being that he has other insurance. We have never stipulated, without qualification, that we insured Gilbert in that policy.

The Court: No. I mean from the facts we have before us. But the question is: Can we today determine its liability?

Mr. Brown: My answer is yes. And may I state why?

The Court: Yes.

Mr. Brown: Why borrow any trouble and worry about Mr. Gilbert? We do not need Mr. Gilbert in this controversy at all.

The Court: All right. Let us try to leave him out and see where we get.

Mr. Brown: Very well.

The Court: Where will we be if we leave him out?

Mr. Stanbury: May I answer that, your Honor? May I answer that question?

The Court: Yes.

Mr. Stanbury: If we leave him out, here is what is going to happen: We pay off 50-50 up at San Luis Obispo. And I am not merely repeating myself; I am going further this time. Ohio sues Gilbert, gets a judgment which is res judicata. We [80] then sue United Pacific. They admit they insured him. We get a judgment against them. If we want to continue the farce, United Pacific now sues McKeon and Page. We have paid that amount out for the man. Of course, McKeon and Page will have the defense: Well, you insured the man. Then if they are stuck, Ohio Casualty says, "We did not insure Gilbert. We are not going to pay the judgment." The question before that court, way down at the small end of the blanket at the end of the line is going to be the very question before this court now: Does Ohio insure Gilbert? That is the alternative, if the parties are going to stand on their strict technical rights by getting judgments against each other before they do anything.

The Court: If you gentlemen agree that that is the issue and that it should be determined at this time, I will attempt to determine it. I do not see how you can escape ultimately having to deal with Mr. Gilbert, Mr. Brown.

Mr. Stanbury: I concede that is the question as far as we are concerned.

Mr. Brown: We are not begging the issue at all. We feel, for the reasons that I gave your Honor before lunch, that the statute says that an owner is the one named in the policy, the certificate of coverage, and that the Ohio Casualty policy does not limit the coverage to "automobiles owned by." It says, "or operated." [81]

The Court: Now, let us look at that just a moment.

Mr. Brown: We are not afraid of the Gilbert issue and we do not wish the court to get that idea. We are certainly not afraid of the Gilbert issue, but I think we are only borrowing trouble.

The Court: "With respect to automobiles owned by or registered in the name of the Named Assured"—

Mr. Brown: That is not the certificate of coverage. The certificate of coverage is—

The Court: You are referring back to page 5 of Exhibit B?

Mr. Brown: Page 5 of that exhibit. That is issued at a subsequent time and qualifies anything to the contrary in the body of the policy.

Mr. Stanbury: I want to be heard on that if your Honor cares to have any discussion on it.

The Court: Yes. I have your point. But for that provision under "Description of Risk" on page 5 of Exhibit B—just so I will understand your position—but for that, Mr. Brown, would you concede that the extended coverage clause, printed extended coverage clause of the Ohio Casualty policy is not broad enough to cover Gilbert?

Mr. Brown: No, your Honor; because of the operation of law, the partnership theory, the aggregate theory as it exists in the State of California. We have an interlocking of [82] partnerships here, two fictitious names are involved.

The Court: Your theory, then, to interrupt you—

Mr. Brown: Yes.

The Court: Your theory, then, would be what you argue in your brief, that because of Page, because of the status of the partnership under California law, that in effect this automobile being in the name of Page is in the name of the "named insured"?

Mr. Brown: It is owned by them and operated by them, and the statute says that they are the owner being named in the policy (383.5). We are certainly not trying to avoid the Gilbert issue. We are not afraid of the Gilbert issue. We will meet it head on any time. But I think we are borrowing trouble.

We have on the blackboard an entirely different case from the one brought here before the court and the issues raised here by stipulation and by the pleadings.

The Court: What can the court decide that will be of any assistance to you unless the court proceeds to decide what you call the Gilbert issue? Conceding for the moment that the controversy that we have been discussing, the controversy that exists when a judgment is had against Gilbert, is not before this court at the present time; it has not arisen yet and it involves supposing. The court has no business trying to decide, supposing something, under the declaratory [83] relief statute, as it can a live controversy. The actual controversy is the responsibility. That is the live controversy. Is that all you want decided?

Mr. Brown: Yes. We want to know who shall pay Mr. Echols. That is why we are here.

The Court: I think who should pay Mr. Echols is a comparatively easy matter right now, if that is all you wish.

Mr. Stanbury: We are asking more than that, your Honor. We are asking a declaration outright on the whole rights of these parties inter se, and that is asked for by both. We have asked for a declaration of our rights.

The Court: How can I do it, Mr. Stanbury? I have to suppose that something is going to happen and then another controversy arises. I will grant you immediately the desirability of winding it all up at one time, but have I the authority to decide it?

Mr. Stanbury: I am satisfied your Honor has this authority: You can't order any money paid by either party, but you can announce what our rights and duties are, and your Honor can adjudicate who insures Gilbert. And the parties to this action, assuming neither party feels that both do, they at least know what basket their eggs are in and either abide by the ruling of this court or appeal and know what their rights are, without chasing all over Nebraska and suing each other, to come back to where we now are, namely: Who does [84] cover Gilbert.

In other words, your Honor can adjudicate our rights and state what the law would be, what our obligation would be as to Gilbert, and the party affected by that judgment can look at it and decide, if they have not reversed it on appeal, assuming anybody appealed it: Well, we know where we stand now.

The Court: It would be obiter dictum.

Mr. Stanbury: I am sure it is not obiter dictum, your Honor, because we have asked the court to declare, not our rights as to San Luis Obispo, but our rights under the policy as to each other.

The Court: The plaintiff here brings this suit. All the plaintiff is asking for is a determination of the present controversy.

Mr. Stanbury: Your Honor, they use very broad language under this paragraph (b) at the bottom of page 6 and running over to page 7.

The Court: Of what?

Mr. Stanbury: Of the complaint in this action; not Echols' complaint, the complaint by this plaintiff.

The Court: You mean in the prayer?

Mr. Stanbury: The United Pacific prayer; yes, sir.

The Court: Paragraph (b) of the prayer?

Mr. Stanbury: Yes, sir. [85]

The Court: "That upon final hearing hereof, this Court enter a declaration that said policy of insurance so issued by plaintiff does not apply to and cover said accident of January 16, 1946; but that the policy of insurance issued by the defendant, THE OHIO CASUALTY INSURANCE COMPANY, applies to and covers said accident to the exclusion of the insurance afforded by plaintiff; * * *"

I am prepared to rule on that.

Mr. Stanbury: The next part, the part the court is just coming to, if I may be so presumptuous as to state how I interpret that prayer?

The Court: I wish you would.

Mr. Stanbury: It is that the Court decree our obligations at San Luis Obispo and declare our rights and liabilities with respect to the accident, and a finding of this court as to the insurance coverage that Gilbert is squarely

within that prayer and certainly within the power of this court.

The Court: Surely that stops the plaintiff from going elsewhere and claiming this court did not have a right to decide that question.

Mr. Stanbury: I grant that, right now, we have got a joint obligation up at San Luis Obispo. But it is to the interests of both parties to have the other part of the plaintiff's prayer, in which we join answered, that is, our rights with respect to the accident, as your Honor put it, and [86] that brings Gilbert right into the foreground.

The Court: As to the inclusion of the employee Gilbert, the prayer is broad enough to declare and call for the responsibility of a judgment against Gilbert. I suppose that would call for a determination: (1) If United Pacific is responsible for the judgment against Gilbert, (2) Ohio Casualty responsible for the judgment against Gilbert? The determination of that would determine the extent of the coverage of both policies, would it not?

Mr. Stanbury: Yes, your Honor.

The Court: Do you feel that the court has jurisdiction under the issues tendered here to make that determination?

Mr. Brown: We feel that the court has power. The declaratory judgment act is broad, and we certainly do not wish to urge the court that the court does not have the power.

Our position is this: We are not begging the issue, but we feel that it is not necessary to keep trying Mr. Gilbert.

The Court: The only way I could determine that coverage or could have controversy determine the coverage as affecting the judgment against Gilbert, as I see it,

would be to assume that Gilbert is sued in this San Luis Obispo action, which he is, and shut my eyes to what has been said about his disappearance, and assume that, since it has been stipulated that his negligence was the proximate cause of plaintiffs' injuries in that accident, that a judgment will be rendered [87] against him, and then decide the question of who is liable under these policies to respond for that judgment.

Mr. Brown: It is stipulated that Mr. Gilbert has not been served in the State court action, therefore, the State court is without authority to enter a judgment of any kind against or for Mr. Gilbert.

The Court: Do you wish me to decide the controversy under that assumption?

Mr. Brown: Yes.

The Court: The prayer of your complaint is otherwise, isn't it?

Mr. Brown: We are here to have the entire controversy decided. My point is that we are trying—this can be compared somewhat to a man being on trial on a murder charge where the prosecuting witness winds up being tried. We are not here to determine Mr. Gilbert's rights, because he has never been served. Mr. Echols is the injured man. The two companies here are the ones being called on to pay him. If we keep talking about Gilbert, we are bringing into this controversy a question that we do not have.

The Court: If you follow the prayers of both the complaint and the answer, there is a controversy, because both of them seem to assume that judgment is to be rendered in this action in San Luis Obispo County against not only McKeon and Page but against Gilbert. [88]

Mr. Brown: At the time that was prepared, if the court will permit me to say, we did not know whether or

not Mr. Gilbert had been served. It was only until recently that we found he had left the state, and when we checked the service here the Marshal's return stated that he had left the state.

The Court: Let us do it this way, Mr. Brown: Where anyone questions the breadth of the controversy in a declaratory relief action I am inclined to confine it. If you wish to confine it to the complaint in this action, if you wish to confine it to the supposition that merely a judgment is rendered against McKeon and Page in the San Luis Obispo County Superior Court, I will be inclined to so limit it. But that will not decide the real controversy between the two insurance companies here, will it?

Let us take the afternoon recess now and you might think that over. I do not want to borrow any trouble to reach out and to make adjudications that I do not have to make, and particularly over the objection of the plaintiff who is seeking declaratory relief here.

We will take the afternoon recess of five minutes.

(Short recess.)

The Court: Well, Mr. Brown?

Mr. Brown: We have no objection, your Honor, to the court deciding all the questions that the court feels should be decided in this case. We brought the action and we do not [89] wish to narrow the issues. My point was perhaps more of argument rather than a statement of a desire for the issues to be narrowed.

Mr. Stanbury: Your Honor, I have not been heard on Gilbert orally here and I do not want to waive it if your Honor cares to hear about it.

The Court: I want very much to hear what you have to say about it. If there is anything in addition to what has already been stated in the briefs, I would like to hear it.

Mr. Stanbury: I have this to say, your Honor: The court says I should not repeat anything that is in the briefs.

The Court: I do not wish to limit you.

Mr. Stanbury: No. I have this to say:—

The Court: My present inclination, I will tell you frankly, is that Gilbert is covered by your policy.

Mr. Stanbury: On what theory, your Honor, and I will direct myself to that?

The Court: Well, upon this theory: He is an employee of a partnership composed of a man named Page in whose name, but as an individual, the vehicle happened to be registered, and the partnership could only operate the vehicle through employees. I do not suppose it is contemplated that the partners would be the only ones who would drive it?

Mr. Stanbury: No, sir.

The Court: Being an employee of a partnership in whose [90] name the vehicle was registered, it seems to me, should bring it within the coverage of the policy, laying aside the declaration of the company as to exemption from coverage of Page's liability outside the activities of the partnership.

Mr. Stanbury: Laying that aside?

The Court: Yes.

Mr. Stanbury: The court does not care for me to discuss that part?

The Court: I have laid it aside in my determination, upon the ground that that was a warranty addressed to an individual and was not a part of the policy as originally issued and is not intended to modify or amend the policy.

Mr. Stanbury: Your Honor, the important thing to bear in mind here is the fact that, although an insurer insures its named assured for everything that it does, it does not have to insure the driver. In fact that is not an uncommon type of policy, to insure my liability everywhere, but not individually for people driving my cars. Is your Honor aware of that type of insurance policy?

The Court: Yes.

Mr. Stanbury: All right. In other words, the mere fact that a man is driving an assured's vehicle and the insurer insures that named assured, the employer, is in no way any reason for supposing that the policy insures the driver as well. And that question can be answered only by [91] looking to the terms of the policy, and when the terms are clear and unambiguous they are, of course, to be followed. And the language of the Ohio policy, in order to determine whether we insured Gilbert or not, we have to look at the definition of "additional assureds." We can't find that he is an assured of this policy merely because we insure his employer and have to answer for him.

The Court: Oh, no, no.

Mr. Stanbury: When he is on duty. You see, the difference would be this: That if he is an additional assured, we have to pay for him when he is joy-riding; but if we are calculating a policy and a premium on what his employer is liable for, then we do not cover him at all. And it is a big practical difference; it is not a technicality.

If this man took a car without any permission whatever, if he ran away as that bus driver did and took a trip to Miami, Florida with the company's bus, if that driver were an additional assured in that policy and he had an accident at Atlanta, Georgia, the company would pay,

whereas they would not have to pay if they merely insured the bus company, because the man is not on duty and does not even have permission to make the trip.

So it is a very important thing. It is not merely a case of saying that, because we insure the employer, we must insure the employee. But the question is: Did we ever [92] embrace this man as an additional assured under the policy? And we have to look to the definition of "additional assureds" here which is covered in our stipulation.

We will find the page of our stipulation in which that is quoted. Yes; at page 4 of the stipulation, your Honor. My copy is underlined. It is paragraph 6 (b):

> "That the policy issued by the Ohio Casualty Insurance Company provides coverage, in addition to the named insureds to, inter alios, 'with respect to automobiles owned by or registered in the name of the Named Assured * * * any person while using the automobile and any person or organization legally responsible for the use thereof provided the actual use is with the permission of the Named Assured.'"

That is the only provision in this policy that can make Gilbert an assured.

The Court: That is the provision I have in mind.

Mr. Stanbury: Yes, sir.

The Court: I was reading it from the policy, the full provision, the first paragraph of the "Automobile Extended Coverage" provision.

Mr. Stanbury: Yes, sir. So that if this man Gilbert is an assured of Ohio Casualty as distinguished from his employer, he must have been driving an automobile owned by or registered in the name of the named assured. That is the [93] whole horizon of the definition.

The Court: All right. What does that mean within the meaning of the policy?

Mr. Stanbury: That is right, your Honor. When we turn to that we know immediately by stipulation that it is not a vehicle registered in the name of the named assured. We have a stipulation that the car was owned by United's assured. So now the only question remaining is whether this was an automobile owned by the named assured, which is McKeon and Page. If it were not for the—

The Court: May I interrupt you there?

Mr. Stanbury: Yes, your Honor.

The Court: Would you say that McKeon was a named assured of this policy?

Mr. Stanbury: Yes, sir.

The Court: Would you say that Page was a named assured of this policy?

Mr. Stanbury: Yes, sir; as "McKeon and Page" only, however. If your Honor will notice that the endorsement—our stipulation, page 3, paragraph 4 (b)—does your Honor have it before you?

The Court: Yes.

Mr. Stanbury: The Supreme Court has held in two cases—your Honor is familiar with National Auto v. Industrial Accident, 11 Cal. (2d)—very specifically that, although [94] there is no such thing as a partnership entity for insurance purposes, it may be created by contract of the parties, and in those cases the clause—well, I would like to get the very language of the policy. This is not our policy. Our policy goes much further. But in the National Auto v. I. A. C. in 11 Cal. (2d) 689, the clause

which was held effective in creating a partnership entity for insurance purposes was this one:

> "If the policy is issued to an individual, it shall cover only his liability as an individual employer and not any liability as a member of a co-partnership or any other organization."

And the Supreme Court held that the parties had a perfect right to make that distinction. The Supreme Court cited the California cases, that there is no partnership entity in California, and therefore that a policy issued to any individual covered him as a partner, the very argument made by United here, and held those cases and those rules have no application in an insurance policy where the parties contract to separate them.

If the parties did not have a right to do that, consider where we would be. First, consider the situation of the man with a variety of business enterprises such as Page. Page went to one company and said, expressly, insure me doing business as this and doing business as that and the [95] other thing and he got a premium on that basis.

Now, he has another activity where he operated a lot of vehicles, different places of business, and he has got a home, and this is a comprehensive policy. He has got obligations there and he has got private cars. He goes to another insurer, the United, and he says, "Insure me as an individual and insure my business here and my business there."

Now, if it were not for the ruling of the court in these cases in 11 Cal. (2d) that parties had a right to do that, no insurance company could write an individual liability policy on a man with many activities, without covering him in all his activities. It could not insure William Wrigley without incurring liability for any business that Wrigley

operates, even if they expressly say, "We are insuring you only as an individual and not in connection with your businesses."

So the question here is whether or not the Ohio policy distinguishes between Page here and Page there, and I submit that more careful language could not be devised by us here, now, with this case in mind.

The Court: This policy is not tailored to Page's situation. That is a printed clause, isn't it?

Mr. Stanbury: No, sir. In the National Auto case it was printed. It just automatically appears there. In ours it is typed. Ours is tailored to Mr. Page, your Honor. [96]

The Court: Where is it typed?

Mr. Stanbury: The pages on my exhibits are not numbered. I have one now that is numbered, and your Honor will find it on page A-2 or page 9, isn't it? Page 9 of Exhibit B, and it was absolutely tailored expressly for this assured, typewritten, and reads this way, if your Honor has it before you.

The Court: I have a printed policy here, Exhibit B. It is Exhibit B and it runs pages 1, 2, 3, 4, 5 to 11.

Mr. Stanbury: Page 9 is the one. Mr. Somers is holding a facsimile of it.

The Court: Page 9?

Mr. Stanbury: Yes, sir. If it is left out of the court's copy, why, that is by inadvertence.

The Court: Yes; I have it, page 9.

Mr. Stanbury: All right, sir. To read that aloud:

> "It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposure or activities; or

his liability in connection with other business activities as an individual, a member of other partnerships, a receiver, a director, or an executive officer of a corporation."

Very pointed language. [97]

The Court: But this automobile was being used in this particular business, was it not, or this truck?

Mr. Stanbury: That is right.

The Court: The question is whether it is owned by the partnership within the meaning of the policy, isn't it?

Mr. Stanbury: That is right. Now, your Honor, if this clause does not modify the "additional assured" clause originally, consider for a moment what is going to happen.

Can we start out on solid ground with this premise that, on the basis of the Supreme Court decisions of this state, parties have a right to insure Page as dba Pacific and exclude him as an individual, or doing business as Mission? That is absolutely a legal right we have, as we made this contract under the California laws. Now, if this modification does not apply to the whole policy, then we would have this anomalous situation:—

The Court: I would not question but what it would apply to the entire policy; but I would question whether it has the effect of changing this printed provision as applied to the situation in the case at bar.. We have to construe this language in connection with all the printed and typewritten language of the policy, do we not?

Mr. Stanbury: Yes, sir.

The Court: And what is the purpose of the "extended coverage" clause? The gist of the extended coverage clause [98] is, isn't it, that the use is with the actual per-

mission of the named assured? That is the thing that the insurance company is interested in, isn't it; and that is the thing that would limit the liability, would preclude liability from the joy-ride in the case you mentioned, would it not?

Mr. Stanbury: Well, no, it would not; because that is the very point I am going to make. We would be then in the anomalous position, which certainly neither Page nor we intended, of insuring the criminal joy-rider, although we expressly exclude Page.

The Court: I do not quite follow you there under this clause. I recall in the United Pacific policy—

Mr. Stanbury: They do not have that limitation. And I am not making any point—

The Court: "Definitions" in Exhibit A, page 2, United Pacific policy, definition of "insured," subdivision (4) says: "any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided actual use is with the permission of the named insured, * * *"

Mr. Stanbury: They go further, you see. They say "additional assureds are people driving hired automobiles."

The Court: "Owned or hired."

Mr. Stanbury: "Owned or hired." We do not.

The Court: You say "owned or registered." [99]

Mr. Stanbury: That is right.

Consider for a moment where we will be—and I ask your Honor to carefully consider this because it is a vital point—consider where we will be if this page 9, special policy endorsement, does not modify, does not apply to the additional assured definition as well as to the rest of the policy.

The Court: Oh, it applies to the entire policy but I do not see where it limits. It seems to me the question is: Was this an automobile owned by a named assured?

Mr. Stanbury: That is right.

The Court: Within the meaning of the policy.

Mr. Stanbury: That is right.

The Court: Is not that the question?

Mr. Stanbury: That is correct.

The Court: I do not see where this endorsement over here has anything particularly to do with it.

Mr. Stanbury: Well, it has this to do with it: The endorsement says we are not taking coverage for Page in any but his specific activities.

The Court: That is true, but this activity we are dealing with here was certainly an activity contemplated by the policy, because this man was on the business of this partnership of McKeon and Page, was he not?

Mr. Stanbury: Yes. [100]

The Court: And he was using the automobile or truck with the express permission of McKeon and Page. Now, the question is: Did the policy intend to exclude or, to put it another way, did the policy intend to cover this additional assured, an employee of the partnership, driving the truck which was devoted to the business of the partnership and happened to be owned or registered in the name of one of the partners instead of the partnership.

Mr. Stanbury: Well, your Honor, it cannot be, without the most absurd results. I will come to those results in just a moment.

First of all, we start out this premise: You can contract a partnership entity; no question about that. Our policy describes Page doing business in two different activities. If we stop there, we would run afoul of the rule

that you can't split an individual up, the rule of the cases that counsel relies on for the United Pacific, if there is no partnership entity, but you can contract.

Now, we go further and we say that we are insuring Page. We are not insuring Page as the owner of this automobile. We have said it very plainly. We are not insuring Page in his personal non-business exposures or his liability in connection with other business activities as an individual.

We have carefully made it plain that our named assured is—who?—Page doing business as Pacific Laundry and Dry Cleaners. You could not use any more careful language. [101]

The Court: This liability is sought to be imposed upon Page in his capacity as a partner with McKeon in that business.

Mr. Stanbury: And we cover him; we cover him admittedly.

The Court: But this endorsement says that the coverage shall not apply to the liability of Page—does not stop there—"a partner," "Page, as a partner"—Page, a partner of the partnership, I suppose. For what? "For his personal non-business exposures or activities;" this is not one of those?

Mr. Stanbury: Yes; it is, your Honor.

The Court: Is this a personal non-business exposure.

Mr. Stanbury: No. Pardon me. The next clause is the one.

The Court: "or his liability in connection with other business activities as an individual, a member of other partnerships, a receiver, a director, or an executive officer of a corporation."

There is a possibility that he might be excluded by the provision "or his liability in connection with other business activities as an individual." That would be the only possibility.

Mr. Stanbury: That is it, your Honor; that is precisely it. [102]

The Court: What are his "other business activities" that are involved here. the ownership of this truck?

Mr. Stanbury: Yes, sir; his ownership of this truck. Look what this policy says. It says that the coverage shall extend to persons driving any car owned or registered to the assured.

The Court: If that were typed in the policy, but that is part of your printed form. It has the same relative application as the definitions under the United Pacific form, doesn't it?

Mr. Stanbury: Yes, sir. But the typing—

The Court: It is a familiar provision in all automobile policies, is it not, in one form or another?

Mr. Stanbury: That is right. And we have gone ahead and hammered it down with typewriting. In other words, to show what we mean with his truck we have hammered it home with typewriting.

And let us just take the policy. We say additional assureds are persons driving any car owned or registered to the assured. Let us look over to the assured Page. We find Page doing business as in three capacities, and nothing else. If we stop right there, this car is not owned or registered to an assured as named. But at that point it would be argued that we encounter the rule in this state that there is no partnership entity, which would be ridiculous between two [103] insurers when the other in-

surer, who is a party to this case, is the recipient of a premium collected for other risks that they claim we took.

In other words, we say here is a man with six personalities, he comes to us for insurance and we insure him for one, two, and three, and we call him by those three aliases; he goes over to our opponent, who is making this argument against us, in his fourth, fifth and sixth aliases. He says, "You insure me." They take a premium for that after taking out a certificate of what they are insuring and they collect them; and then they come around and say, "Look here, although we took him as fourth, fifth and sixth and have been paid, you took him as one, two and three. We maintain you also took him as four, five and six."

If we stop there, your Honor, we have an anomalous situation and a ridiculous situation when the argument comes, not from the injured party, but from the insurer and premium collector from the other half of this split personality.

But we go further; we bring ourselves right within this Supreme Court case by in effect typing on the policy typing on it showing we have thought about it, showing that the certificate contemplated the risk, just as Page did. Page went to see the other company to get his other insurance. This is no technicality. The man deliberately did it.

The Court: Didn't your company, the Ohio Casualty, [104] insure the risk, the motor vehicle risks of this business of McKeon and Page?

Mr. Stanbury: Positively. We owe it to them.

The Court: Was not the operation of this truck by this man Gilbert one of the business undertakings of that partnership?

Mr. Stanbury: Why, absolutely, your Honor. But suppose Page and McKeon were dead and someone was suing Gilbert. That is what I am now talking about. Our partners are dead. They are now suing Gilbert. They have got to show that Gilbert is an assured under this policy.

And what do they have to do? They have to go and show that the car was owned or registered to the assured under this policy, and it is a policy that we have an absolute right, as the assured asked us, to split his personality.

The Court: There is no question about it. But the assured is named as "R. H. McKeon and G. B. Page dba Pacific Laundry and Dry Cleaners," and the question I have to decide is this: Is this an automobile owned by or registered in the name of the named assured within the meaning of that policy.

Mr. Stanbury: Within the meaning of the policy. There is the nub of it absolutely.

The Court: It might be a little different problem to my mind if the assured had been named as Pacific Laundry and [105] Dry Cleaners, a partnership composed of R. H. McKeon and D. B. Page.

Mr. Stanbury: Your Honor, it is the same thing exactly.

The Court: Legally, yes; but it is a question of what was intended, and the construction must be against your company, must it not?

Mr. Stanbury: That is right.

The Court: Isn't that the rule?

Mr. Stanbury: That is the rule. But, your Honor says, there might be less question in your mind as to

what was intended. This page is as clear as any lawyer could write it. It is just as plain as can be written.

The Court: Now, Mr. Stanbury, they could have said: If this company hires any automobiles, uses any automobiles other than those standing in the name or owned by, we do not insure those.

Let us stop and analyze these policies here. Here is a partnership and, as you say, here is a particular activity, seeking insurance. If this truck had been owned by Page and it just happened that the motor vehicle certificate was issued in the name of this cleaning company, Mission Laundry and Dry Cleaners, there would not be any question in your mind, would there? You would not have anything to say?

Mr. Stanbury: You mean if it was in the name of our assured Pacific Laundry? [106]

The Court: Suppose that out of a matter of business pride, when they painted the name on this truck of this Mission Laundry and Dry Cleaners, Page had said, "Well, since the company is using it, we will make the company registered owner and I will be the legal owner," you would not have a word to say, would you?

Mr. Stanbury: No.

The Court: Why? The partnership bought this car and covered the motor vehicle liability of this partnership.

Mr. Stanbury: Correct.

The Court: And your company issued this policy and limited it to the business activities of this partnership.

Mr. Stanbury: That is right.

The Court: Now the question is, turning the problem around the other way, can we say that your company intended not to assume any risk of any automobile which

did not happen to be registered in the name of the partnership?

Mr. Stanbury: Oh, no, your Honor.

The Court: Well, isn't that what your argument is?

Mr. Stanbury: No, sir. I must take great pains. I had suspected that I had not made myself clear. Your Honor does not understand my point at all. I must make it clear.

We do insure McKeon and Page for every horse, automobile, bicycle and motorcycle or wagon they have, everything. We insure those men. [107]

The Court: Wait just a minute, though.

Mr. Stanbury: Yes.

The Court: They have 10 trucks and Saturday morning they get some extra calls for Monday, and they say to Gilbert, "Gilbert, you have an old station wagon, haven't you?" Gilbert says, "Yes." "Well, bring her down Monday. We have got to put that on a run Monday morning because so and so has some extra work for us."

Gilbert brings it down. It is registered in his name. Was it your intention that you not cover that in the policy?

Mr. Stanbury: Sure, we cover that, your Honor.

The Court: The automobile is not registered in the name of the named insured.

Mr. Stanbury: It does not have to be. We insure McKeon and Page. If they went out and got 500 trucks, we would find it out on our next survey and say, "Look here, your premium is going to be so much." We insure McKeon and Page in any illustration your Honor can think of. But that is not the point. The Point is: Do

we insure Gilbert? And the answer to that is unescapable if I make myself clear.

The Court: Yes. Now, Gilbert, on Saturday noon, was driving a truck owned by Page, registered with the vehicle department in the name of Mission Cleaners who are insured; to accommodate his employer he brings down his own station wagon. He is not insured? [108]

Mr. Stanbury: He is not insured, no, sir; except under his own policy. It is precisely the same situation that this country is full of and, I guess, England. I don't know anything about the continent, but policies are written that way.

The Court: Yes; I understand.

Mr. Stanbury: Without any additional assured clauses whatsoever.

The Court: And that would be a situation, a hardship, yes. But you would have to do violence to the language of the policy, so the policy could not be construed without doing violence to the language to cover that situation so as to insure Gilbert, could it? But here we have a situation where the vehicle is used by the partnership, in the business of the partnership, and is registered in the name of one of the partners who is named as one of the assured in the policy, who is a named assured in the policy, and that truck is devoted to the business. And the question is whether the limitation of the extended coverage clause would defeat coverage of Gilbert under those circumstances.

Mr. Stanbury: Well, your Honor, as your Honor well knows, with the court's background of practice, the language used in these policies is ordinarily not idle language; it usually has a meaning. Look at United Pacific's policy. An additional assured of the United Pacific is a person

driving [109] an owned automobile or a hired automobile.

The Court: Yes.

Mr. Stanbury: Expressly. The Ohio Casualty policy is not that way. It says an automobile owned or registered to assured.

The Court: And what does that mean, "registered to"? The purpose of that obviously is that if the company had bought it and had not paid for it, or had mortgaged it to someone, pledged it, and it was merely the technical owner or entitled to use it, you might say, it would still be covered if used in the business and if being used with the express permission of the assured.

Mr. Stanbury: No, your Honor. It has an obviously different meaning. Your Honor put a case where they might say, "Gilbert, bring down your station wagon." They might say that to a lot of people, maybe, to move a lot of stuff. Those people are running all over town.

As a practical matter, as we all know, the man who has an accident, if he hasn't any insurance, runs for cover and tries to get under some policy. There is a vast difference between a company insuring the master or the hirer of independent contractors, the named assured, and insuring every driver who has a truck that he is just using for the company, whether it be his own or whether it be one that the company has leased. We must find coverage within the language [110] of these policies.

The Court: Did your company, the Ohio Company, in issuing this policy, have in mind that if the employer went to the trouble of having these cars or trucks registered in the name of the employer as registered owner, and someone else was the title and legal owner, that those would be covered, whereas the employer, even though using

them and even though the vehicle is in the name of one of the partners, that the insurance would not extend to the present case?

Mr. Stanbury: I would say, without any question, they did, your Honor.

The Court: What practical purpose would the difference in the registration, as far as registration, mean to the insurance company unless it refers to a vehicle that has been purchased and has not been paid for?

Mr. Stanbury: I am not concerned with the registration clause, your Honor. "Owned." I am taking a broader one. We did not own it, by a different definition, either by 68 of the Vehicle Code or any other way. We can forget "registration."

Transferring your Honor's remarks to the broader ground, that here would we be interested in whether the assured owned the vehicle or not, let me show you what is going to happen here if your Honor interprets this clause as insuring Gilbert.

Here is what is going to happen: We have three men over [111] on this side of the table and three over here, and they are all Page; and there are two insurers and Page himself. This is no trick by an insurance company, none whatsoever. Page goes to one insurer, Ohio Casualty, and he says, "Insure me in these three capacities over here;" and he goes to the other insurer and he says, "Insure me in those three capacities over here." And they make the policy clear and there is no doubt about it. This company does not insure these three personalities over here to my right. But if the clause on "additional assured" does not mean anything, we insure the driver of every one of these three personalities here, no matter

how many he has got; if he has got 50, we insure them all.

The Court: Not unless the vehicle is being used with the express permission of the named assured. Isn't that the gist and meat of the whole provision?

Mr. Stanbury: Yes. But, your Honor, look, look what happens here if the court's tentative idea is correct. They are owned by a named assured, don't you see, they are owned by a named assured. If that is correct, we insure McKeon and Page right here. Now, if and when we say we mean "McKeon and Page," we do not mean Page doing business as Mission or this other thing.

The Court: We mean vehicles operated in the business of McKeon and Page. [112]

Mr. Stanbury: That is right.

The Court: And this vehicle—

Mr. Stanbury: No; we do not mean that, your Honor. We say we insure McKeon and Page for vehicles operated in their behalf, but we do not insure the driver unless McKeon and Page, or one or the other, owned the vehicle.

I am not making myself clear at all. We agree that there are excluded capacities, do we not? We agree that Page is not blankly insured; we have to admit that. The policy makes it too clear that there are certain activities of Page under the United Pacific policy that we do not insure. That much is certainly very definite. In this excluded capacity Page might operate one dozen vehicles, and probably did, and the company, United Pacific, insures it. That means 12 drivers. Is it reasonable to say that, although we go to the trouble to say we do not insure Page under United Pacific policy as Mission Dry Cleaners, we neverthless insure his 12 truck drivers?

It is not conceivable, your Honor, unless the additional insured clause means what it says. Does your Honor realize that the Ohio Casualty Company insures every truck driver driving a truck owned by the United Pacific's named assured, George B. Page doing business as Mission Linen and Towel Supply?

The Court: Oh, no; that would not be so unless it were [113] being used in the business of McKeon and Page with the express permission of the management of the partnership; isn't that so?

Mr. Stanbury: No, sir. It is his ownership, not use.

The Court: Now, there is the question of construction. Is Ohio Casualty, as insurer, interested as much in ownership, or is it interested in whether or not the vehicle is being devoted to the business with the permission of the owner?

If this case here were a case where Gilbert had taken the truck on a joy ride and a dereliction of his own caused these injuries, and the trucks were in the name of the partnership, the emphasis would be on the question of actual permission, the actual use was with the permission of the named assured.

Mr. Stanbury: Why, your Honor, I do not see how we can find any such language anywhere in this contract. The language is clear, "vehicle owned or registered."

The Court: Let us read the entire paragraph to help our thinking.

Mr. Stanbury: Yes, sir.

The Court:

> "With respect to automobiles owned by or registered in the name of the Named Assured the unqualified word 'Assured' wherever used in this policy

> includes not only the Named Assured but also [114] any person while using the automobile * * * provided"—

I am leaving out the other contention, the question of organization. That is not important here.

> "—while using the automobile * * * provided the actual use is with the permission of the Named Assured."

Mr. Stanbury: That, if your Honor noticed it, does not say "using an automobile" but "using the automobile."

The Court: What automobile?

Mr. Stanbury: What automobile? With respect to the automobiles owned by the named assured.

The Court: Yes. So my problem is to decide what is an automobile owned within the meaning of the policy. By whom? The named assured. Who is the named assured? It is the partners and the partnership, isn't it?

Mr. Stanbury: No, sir. I can't admit that, your Honor, because the policy there carefully and precisely distinguishes it.

The Court: And the limitation that you are speaking of is the limitation that the vehicle be in use on business of the assured or at least with the express permission, the actual permission of the partnership, and hence presumably in the business of the partnership at the time.

Let us take this sort of a situation: Here is a man, Floyd Gilbert, who works for this concern; and there are three trucks, all of them belong to Page, two of them he has [115] had put in the name of the partnership as registered owner, the third one he had just never gotten around to, devoted to the business of the partnership, is not used for anything else. Gilbert makes deliveries.

This morning he starts out in the truck registered in the name of the partnership and he has an accident, and he is covered. This afternoon he is in the other one, he has an accident and he is not covered. He is the representative of his employer at all times. Is that the intent of this policy that is called a "comprehensive policy"?

Mr. Stanbury: Yes, sir. The intent of this policy is to insure the named assureds for everything and such additional assureds as we designate. Remember, we are not withholding anything from anybody from whom we ever took one cent of premiums. They are getting full value. There is no argument with our assured, and when an interloper comes in and says, "I am a beneficiary of this particular policy from an assured," our assureds are taken care of. But when he says he gets the policy from an assured, we have a right to say, "Show me what policy and just what are you relying on." And he must go to a clause which says he must be driving a car owned by our assured, and when we look to see who are named assured is, we find a partner designated in a certain business and we find a clause that says as plainly as we can conceive, unless a man could have a crystal ball and see every refinement [116] that comes up—we can't conceive any clearer language when we say we are insuring this man Page, not as a partner in any other business or as an individual, but just as named.

The Court: You have admitted that you insured Page under the statute here.

Mr. Stanbury: That is right.

The Court: The question is: Have you insured Page's employees?

Mr. Stanbury: That is the full point, your Honor.

The Court: In other words, was it the intention of the policy to extend its coverage to Gilbert if he happens to jump up in the truck that happens to be registered in the name of the partnership, even though only bought yesterday and never yet used in the business of the partnership, but he is not covered if he lets someone else try out the new truck and he takes the old truck that has been used all along but happens not to be technically registered in the name of the partnership, but is registered in the name of one of the partners? Is that the intention of this kind of a policy?

Mr. Stanbury: Without a doubt, your Honor. The United Pacific's usage of words expressly contrary "owned or hired," there is an absolute distinction there.

The Court: But this is a printed form presumably for the same purpose. This is print. This is not any [117] insurer for anything but premium money and it presumably covers motor vehicle liabilities of a business, does it not?

Mr. Stanbury: For the proprietors; yes, sir. There is so much difference, your Honor, between things that your Honor thinks are the same that I do not know where to begin. There is such a tremendous difference.

The Court: Let me ask you this: Do you suppose that a salesman selling insurance for the Ohio Casualty Company would tell the businessman, "You had better buy the United policy because it covers more than our policy; we both call them 'comprehensive policies,' but you had better buy United"?

Mr. Stanbury: Without any doubt they would. They even went to the trouble of typing up exactly what they would not cover. Page went—and for reasons unknown to me, certainly not for that reason—I don't know why—

went to the other company and said, "You insure me over." Of course, Page does not care whether Gilbert is insured or not. Page has no interest in him.

The difference between a policy that insures the drivers and does not is tremendous, and I would like to undertake, your Honor, to briefly point out what the difference is.

How is the premium arrived at in one of these comprehensive policies? By a survey of the applicant's assured's activities.

The Court: His accident record. And is that accident [118] record affected by whether or not the truck the employee is driving happens to be registered in the name of the partnership—

Mr. Stanbury: Definitely, your Honor.

The Court: —or happens to be registered in the name of one of the partners?

Mr. Stanbury: I will guarantee—I haven't seen it—but I will guarantee the United Pacific shows this vehicle, and I will guarantee that ours does not show it.

The Court: Was the vehicle being used in the business of the partnership at the time this policy was written?

Mr. Stanbury: I do not know. It must have been at the actual business date of this policy. It very likely was, probably was, yes.

The Court: Ohio Casualty's policy is dated March 16, 1945.

Mr. Stanbury: Yes, sir. We get a non-ownership premium from McKeon and Page.

But look at the difference, your Honor. I run a law office and I have stenographers and associate counsel and partners, and we get a blanket policy. Our policy does

not cover anyone but ourselves. The men carry their own insurance. The premium is affected by that.

If we have a policy that makes additional assureds out of everybody in that office, the company has a row every time one [119] of those people has an accident.

The Court: Let us turn it around the other way. Do you suppose it was contemplated in buying this policy that that extended coverage to the persons using automobiles with the consent of the assured and was not put there to cover employees?

Mr. Stanbury: I certainly say, your Honor, that it was put there only to cover people driving cars owned by the assured.

The Court: Yes; it was put there to cover people driving cars that were covered by this policy.

Mr. Stanbury: No, sir.

The Court: In other words, the policy was written for the benefit of the partnership, with knowledge that the partners would not go out and drive the trucks; isn't that so; that they would have truck drivers?

Mr. Stanbury: Yes; that is right.

The Court: Who are these truck drivers? They are employees of the partnership; and the purpose of the policy was to extend its coverage to those people, was it not?

Mr. Stanbury: No, sir; because the language very clearly says we insure as additional assureds those driving trucks owned by the named assured, not other people.

You see what could happen. We make an agreement with United Parcel Service to deliver packages for us, and a contention could be made that, because we told the men of the [120] United Parcel Service where to go and how to go and to be polite to our customers, that they

were our employees. Then we would be insuring the drivers of the United Parcel Service.

It makes a tremendous difference, your Honor. It makes a very great difference. We had a right, of course, if Mr. Page was stupid enough to buy such a policy, to say, "We will only insure people driving Chevrolets."

The Court: No question about that. The question is what you sold. What do you sell them in the way of coverage, or what do they have in the way of coverage, and what was intended for the partnership in the way of coverage?

Was it intended that, through technicality of registration, even though registered in the name of one of the partners, should govern to determine whether or not an employee was covered?

Did you, by naming the partners, also name them as assureds and say, "Yes," as within the meaning of the policy a truck was owned by and registered — it was "owned by" at least in the name of the assured.

Mr. Stanbury: What would the situation be if McKeon and Page came to the company, owning eight trucks, and getting insurance for eight trucks and drivers, and if they were a concern which hired United Parcel Service and various people, a newspaper, for example, with all the newsboys disbursing their papers in all kinds of cars promiscuously used, doesn't [121] it make a tremendous difference to the insurer whether we insure all those drivers or not?

The Court: Surely. But this partnership is not going to have people doing things that are not in the course of business of the partnership presumably; isn't that so? If you can count on businessmen, businessmen are in business for profit. They do not engage in wild ventures that

are not in quest of profits. And this company, by a comprehensive liability policy—and I just wonder what it is—call it a contract; it is a contract but it is sold; it is sold like merchandise. We will take judicial notice of that as a matter of common knowledge.

Mr. Stanbury: Yes, sir.

The Court: Would the salesman selling this policy, would the broker selling this policy be a person who would say, "Yes; it is supposed to cover the same comprehensive matters that are covered by United Pacific Company's policy but ours is narrower. We won't cover an employee unless he is driving in an automobile that is actually registered in your name or owned by you"?

Mr. Stanbury: But, your Honor, if your Honor's reasoning is correct, then all the policies must be construed alike.

The Court: No.

Mr. Stanbury: Because, otherwise the argument could be made that our salesmen would have to admit that our policy is [122] much better than theirs but, confidentially, it is not as good as theirs on this little point, and that does not happen.

The Court: If we had a corporation here, it would be a much clearer situation. What I have to do is to try to construe the meaning of "named assured." The two partners are named 'dba Pacific Laundry and Dry Cleaners, (and Fashion Cleaners) (and Mission Laundry & Cleaners)."

Mr. Stanbury: Yes; Pacific Laundry and Dry Cleaners.

The Court: I would like to think about that some more.

Mr. Stanbury: All right, your Honor.

There is one last thing that I want to say, your Honor, and that is that our assureds who paid for this premium got everything they paid for, comprehensive liability. That is not affected in any way by the fact that we say we do not insure Gilbert, because Gilbert does not come within that definition.

The Court: Of course, what United Pacific writes in its policy does not control. I was just speculating here. It so happens they are two competitive policies apparently.

Mr. Stanbury: Well, that is right, your Honor.

The Court: I had not been accustomed to hearing one insurance company admit that another wrote a better policy.

Mr. Stanbury: But if I went through our policy with that in mind, I might find a lot of things in ours better than theirs. But I submit the word "owned" is not the same as the [123] words "owned or hired." There is a difference, and I just want to say one last thing if I may, your Honor.

The Court: You may.

Mr. Stanbury: In the National Auto case, in the first National Automobile Insurance Co. case a man ran a restaurant called the "Busy Bee Restaurant," as I recall the name; and he took a partner during the policy, and then it was Jones and Buel instead of just Jones doing business as Busy Bee Restaurant, same street, same number, same business. And there is a printed clause in the policy which says where we insure an individual it does not insure him as a partnership. The court says that what the contract says and that it is what it means, and there is no coverage. We took the trouble of typing it in there.

The Court: It is a question of interpretation on a workmen's compensation policy. It is a problem in reading the policy as a whole. It has to be construed most strongly against the insurer, doesn't it?

Mr. Stanbury: And they didn't do it. The court says, however, there is no ambiguity. That is ours. What the court said is that we concur that ambiguities are to be decided against the insurer, but the language is plain.

The Court: We read these policies in the light of the business setting in which they are handled, not in vacuum. They are not literary documents. [124]

Mr. Stanbury: No, sir; but they still must mean what they say. And if we tried to get out of one word to our assured, he would say, "Look, that is in there." And when we have got to clear exclusion—

The Court: I submit I do not hear Gilbert claiming that you haven't a clear exclusion. There is no question you are entitled to it.

Mr. Stanbury: Gilbert is that forgotten man here, but he is not complaining. He is not saying he is not doing the right thing because he is covered under another policy, anyhow.

There is one more thing and I think it is important, myself. My associate here calls my attention to it. Consider a real estate office which runs three automobiles, then he has got a lot of salesmen driving their own cars, going all around. Can your Honor not see the difference in the desires of the realtor in the covenants and premium in insuring, let us say, his payroll employees? Of course, the realtor is insured for everything; he has got comprehensive and he is never going to have a complaint. He has brought comprehensive, he has got it.

But on these additional assureds can your Honor not see the difference in the desires of the realtor in the risk run by the insurer if he insures all of these part-time salesmen who buzz like bees around some real estate offices, going out showing prospects here and there, insuring all of those people, [125] employees, as your Honor has attempted to construe this policy, driving cars on behalf of the realtor, and insuring merely the payroll employees, those driving the realtor's cars? That is this case.

The Court: Oh, yes; there is a great difference. But if Joe Doakes brings down his automobile and he uses it under an arrangement, that is quite a different problem. But here is an automobile—there are two automobiles or three, as you put it, and it is Smith and Jones, realtors, and two of them are in the name, Smith and Jones, Realtors. The third one has printed on it "Smith and Jones, Realtors," looks just like the other two; it may not be the same make automobile; it is used in the business the same as the other two and happens to be registered in the name of Smith only.

Mr. Stanbury: I don't care about that.

The Court: That presents a different problem to me.

Mr. Stanbury: I am not urging the registration clause, your Honor. That would be the most technical defense.

The Court: It happens to be owned by Smith only.

Mr. Stanbury: Well, yes. I maintain there is a considerable difference.

The Court: It happens to be owned in the sense that he has title to it.

Mr. Stanbury: Because we have got to draw the line somewhere. Every contract has got to have some begin-

ning and some [126] ending. And when we start giving it some ending by other than what is printed in it on the assumption the parties were joking when they did that, or it did not make any difference to them, then where in the world are we? We used plain language and I submit there is nothing else to turn to.

The Court: I am not going to make a new contract. I am testing my thoughts here in this discussion. I do not propose to re-write the contract or read anything out of it or anything into it. I want to find the true meaning in the light of the circumstances which control.

Mr. Stanbury: Your Honor, my last request would be, unless your Honor has recently looked at it, if your Honor will read those two Supreme Court cases of National Auto v. Industrial Accident, and they are very close to the construction of this specific case.

The Court: I had them up not very long ago, but it has been a few months ago. I want to read them again and any other decisions that either side has that will aid in this construction.

Will you gentlemen be able to come back two weeks from this afternoon at 1:30?

(Discussion of time for continuance omitted from transcript.)

The Court: I will continue the case for further proceedings until July 11th at 1:30 in the afternoon. If either [127] of you gentlemen find any decisions that will be helpful on this question of construction, I will be glad to have them, and, of course, a copy to the other side. Just a mere citation would be all I would want.

Mr. Stanbury: All right.

The Court: July 11th at 1:30. [128]

Los Angeles, California, Monday, July 28, 1947
10:00 A. M.

The Court: Gentlemen, since comparison of your two sets of findings you submitted involves a proof-reading process, I thought it might be best if we discussed the findings proposed by both sides. I started out to conform the findings proposed by the plaintiff upon that basis when I discovered over toward the end that a finding was just a quotation; so I abandoned that process, and we will start now as a basis and we will use the findings proposed by Ohio Casualty Company.

Under Finding I, lines 23 and 24, the language should be modified to read "Southern District of California." Do you find that?

Mr. Stanbury: Yes; I have found it, your Honor.

The Court: Do both agree on that?

Mr. Stanbury: "Residing in the Southern District of California." What comes out, then, your Honor? Does the rest of it come out or just put in the words? Just take "United States District Court" out?

The Court: It should read: "'Southern District of California," so you would strike the words "the United States District Court for the State of."

Mr. Stanbury: Oh, yes; that is right. Yes.

The Court: There is no question, I believe, in paragraph II, is there, Mr. Sackett? [130]

Mr. Sackett: No.

The Court: Paragraph III, apparently you made some objection, Mr. Sackett, or had some objection to that portion of the findings commencing upon line 16 on page 3.

Mr. Sackett: I do not believe, if your Honor please, that we made any objection to Finding III.

The Court: If there is none, we will just pass on.

Mr. Sackett: That is right.

The Court: None in Finding IV?

Mr. Sackett: None to Finding IV, your Honor.

The Court: Or V?

Mr. Sackett: None to V.

The Court: Or VI?

Mr. Sackett: There is no objection to VI.

The Court: VII?

Mr. Sackett: That, your Honor, I believe is really a matter of inquiry rather than objection, to whether or not it was your Honor's intention to make a finding that it was the intention of McKeon and Page to recognize the partnerships as separate entities. Starting on line 6, where the court stated:

> "The Court finds that it was the intention of R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners, in procuring the aforesaid policy [Exhibit A of Answer of said Company, incorpor- [131] ated herein by reference] to recognize the various partnerships R. H. McKeon and G. B. Page insured by said policy, including the partnership conducted under the fictitious name of Pacific Laundry & Dry Cleaners as separate entities and to differentiate the activities of G. B. Page as a partner of R. H. McKeon in the enterprises named in said policy from the activities of said G. B. Page (also known as George B. Page) individually or in connection with any unspecified activity, all in accordance with the endorsement set forth in this paragraph."

The Court: What is your view of the meaning of that endorsement?

Mr. Sackett: Pardon?

The Court: What is your view of the meaning of that endorsement?

Mr. Sackett: General endorsement No. 3, and, as I say, it is a matter of inquiry rather than an objection, as to whether the court's decision announced on July 11th was based upon General Endorsement No. 3 as well as the language of the policies proper on the extended coverage provision. That is with respect to automobiles owned by or registered in the name of so and so. And, as I understood—I may have been misled—that the court's decision was based upon the fact that under the language of the extended coverage [132] provision, therefore, that Page was not or George B. Page was not that insured of the Ohio Casualty policy.

The Court: Yes; I announced it that way. I will put it in this manner: I was confirmed in that conclusion to some extent by the endorsement there. I had not intended to find specifically that the parties Pacific Launry & Dry Cleaners or any other particular partnership or activity of Page. I think what saves the Ohio Casualty Company from the same liability, saves them, in my opinion, from the coverage of Floyd Gilbert, who was the driver, is the difference in the condition attached to its definition of an "additional assured." Ohio Casualty Company limited "additional assured" to automobiles owned by or registered in the name of the named assured.

Plaintiff, United Pacific Insurance Company, did not so limit the "additional assured," but provided that even with respect to a hired vehicle used with the permission of the named insured, the coverage would be extended to

that driver; and, of course, that is the precise situation here, isn't it?

Mr. Sackett: That is true, your Honor.

The Court: It was made to order, so to speak, for that differentiation. And I came to the conclusion, after considerable thought. And I must say that the typed endorsement aided me in reading the entire policy and seeing the reason for what otherwise might be purely a technical differentiation. [133]

If Ohio had not so limited the policy, or, put it this way, if Page were the "named assured," Page himself, individually, rather than Page, a co-partner doing business under the—

Mr. Sackett: Pacific Laundry and Dry Cleaners.

The Court: —Pacific Laundry and Dry Cleaners, then Ohio Casualty would have been writing a policy that would cover every vehicle registered in the name of Page, wherever it was being used, and that manifestly was not the intention of the policy. So my conclusion was that the "named assured" had to be Page in a particular capacity, that is, Page, a partner, in a particular capacity.

Mr. Sackett: And that capacity limited.

The Court: So I do not see anything in this finding that is contrary to my reasoning; and I do not see anything in the finding that would assist the Ohio Casualty particularly in view of my decision in the matter. If I am in error, I do not see anything in this finding here that would help them perpetuate the error.

Mr. Sackett: No. I will agree with your Honor on that. The main thing, as I stated, was—and the court has cleared that confusion in my mind up—that the court did base its decision on the general endorsement as well

as upon the provision, the extended coverage provision, of the Ohio policy.

The Court: You have here a situation of what is the [134] named assured here. And is that "doing business as" a description? And it might be in some cases. If we had an insurance policy in an ordinary situation, reading "payable to John Smith doing business as Mission Cleaners," I suppose, unless the question became very material as to John Smith doing business in a different capacity, you would assume that "John Smith" was the name of the assured, wouldn't you, without more?

Mr. Sackett: That is right.

The Court: But here, this typewritten endorsement fortifies the construction that the intention was not to insure Page himself, without more, but that "doing business as Pacific Laundry and Dry Cleaners" is a part of the name of the assured.

Mr. Sackett: That goes, of course, to the matter of argument.

The Court: If that typed endorsement were not there, I think I should have to reach that result in order to prevent doing violence to the language of the policy, even though it might be printed language of the policy. But the typed endorsement indicates that it was not an accidental result, but that the parties actually thought about it. That is what it adds up to in my mind.

Mr. Sackett: Of course, it was our contention with regard to this endorsement that this particular automobile [135] was not being used by Page in a type of activity encompassed by General Endorsement No. 3; in other words, it was not a different business enterprise; it is not the personal matter; it was the Pacific Laundry and Dry Cleaners who were using and had the exclusive

use of this vehicle for a long time prior to the occurrence of the accident, and it was being used by their employee through Page and McKeon doing business as Pacific Dry Cleaners.

True the vehicle was registered in the name of Page as Mission and he had leased it to himself and his partner as Pacific, but there was the activity that was insured under the Ohio policy and which the Ohio policy, we submit, had definitely intended to insure.

Now, because it had not been registered in his name as Pacific Laundry and Dry Cleaners, then their extended coverage endorsement and their other general endorsement No. 3 becomes operative and says: Well, that is a different business enterprise. It has been our contention all the way through that it was not a different business enterprise; it was the very business enterprise and activity that Ohio intended to insure.

The Court: Must we not assume that the language opposite the part of the name of the assured which says "doing business as Pacific Laundry and Dry Cleaners," means something or must be read in connection with the other name? That is the crux of the problem, isn't it? [136]

Mr. Sackett: Yes.

The Court: Who is the named assured of Ohio's policy? That is really the pin-point problem.

Mr. Sackett: That is right.

The Court: I think the answer to it is just to read the policy and find out who is the assured; and the assured is "R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners."

Now, what is the extent of the coverage or additional assured provision? So it says:

> "With respect to automobiles owned by or registered in the name of the Named Assured the unqualified word 'Assured' wherever used in this policy includes not only the Named Assured but also any person while using the automobile * * *"

It so happens that this automobile was not "owned by or registered in the name of the Named Assured."

Now, that saves the Ohio Casualty from coverage of Gilbert, in my opinion, if the other endorsement did not exist, but if that endorsement did not exist, you might feel and I might feel: Well, that was just a lucky accident for Ohio Casualty. It just so happened the printing was just that way.

But when we look at this endorsement we see that it was an intended limitation, and so often, as we all know, by lucky printed provisions, fortunate under the circumstances, [137] an insurance company may either incur liability or escape liability.

For that reason I do not think that Finding VII adds anything. If you feel there is any serious objection to it or that it obscures the question that you might wish to raise on appeal, I would delete it.

Mr. Sackett: None whatsoever, for this reason, your Honor: That our whole theory, as the court is familiar with it, is based, regardless of whether there was the endorsement on there or the extended coverage provision, one or both,—our whole theory of the case went to both. In other words, I do not see where it affects the decision of the court at all to apply the reasoning that the court has to the endorsement.

The Court: Very well. Then we will pass VII.

Any objection to VIII and IX?

Mr. Sackett: IX, the only objection which we might have—

The Court: You add something in your Paragraph VII.

Mr. Sackett: That is the only thing. It should be added that the truck was in the exclusive possession and being exclusively used by the Ohio's assured.

The Court: Do you feel that adds anything?

Mr. Sackett: I think it goes to the background.

The Court: The evidence shows that; the stipulation shows that.

Mr. Sackett: The stipulation shows it. Of course, as [138] I understand, the findings follow both the complaint and the stipulation, based upon the court's decision.

The Court: If you wish that in there, I am perfectly willing. I take it that if you went up on appeal you would take that in there?

Mr. Sackett: I think that is right.

The Court: As I recall it, you made a stipulation with respect to the sign on the truck.

Mr. Sackett: That is correct; so we do not believe that is necessary.

The Court: Very well. X or XI?

Mr. Sackett: None to XI.

The Court: XII?

Mr. Sackett: Upon XII I would like to ask again and have counsel's views on whether the word "solely" should be used in line 28—"and each of them were solely and proximately caused by negligence."

Mr. Stanbury: The reverse of that, your Honor, is that if Echols is partly to blame, Echols has no cause of

action; and our stipulation is that Echols is entitled to recover and that his losses were caused by Gilbert.

The Court: Subject to the unquestionable possibility of contributory negligence.

Mr. Stanbury: Yes, sir.

The Court: Is there any objection to it? Up in XI, [139] gentlemen, it is correct that the truck was registered to Mission Linen and Towel Supply?

Mr. Sackett: That is correct; that was the stipulation.

Mr. Stanbury: Yes, sir.

The Court: I knew it was registered in Page's name.

Mr. Stanbury: It is registered—

The Court: Registered in the name of Page doing business as.

Mr. Sackett: That is the way I believe it is. George B. Page.

The Court: But this finding says it was owned by Page doing business as Mission Linen and Towel Supply and registered to the Mission Linen and Towel Supply Company.

Mr. Stanbury: I believe that is our exact stipulation.

Mr. Sackett: That was our stipulation, and that is correct, your Honor.

Mr. Stanbury: Just one moment. Let us make sure of it. It says in the stipulation, page 2, paragraph 2(a):

> "That the accident out of which the present insurance coverage controversy arises occurred on January 16, 1946, when a truck owned by George B. Page dba Mission Linen and Towel Supply Company and registered to Mission Linen and Towel Supply Company, * * *."

The Court: Very well, that covers it. [140]

Very well, XIII. Is there anything in XIII that either of you object to?

Mr. Sackett: With regard to that, if the court please, we believe that Gilbert should be omitted from that finding, except it should not be omitted on lines 11 and 12.

> "that it is true that the said Robert Echols and Beverly Echols are entitled to recover damages in excess of $3,000.00, exclusive of interest and costs, against any or all of the defendants named in their said action against the defendants named in (1) and (2) of this paragraph solely through the imputation to them of the negligence of Floyd Gilbert by operation of law."

I again arise to a point of inquiry. Can the court make that type of a finding, including Gilbert, in view of the fact that Gilbert has not been served in either action, neither in the State Court nor this court.

The Court: If you gentlemen stipulate that, that those are the facts in the action. That is what it amounts to; you are stipulating what the facts are.

Mr. Sackett: That Gilbert was negligent?

The Court: I considered your objection to including Floyd Gilbert, but I cannot assume that there is not a possibility that, the day before that action goes to trial, Floyd Gilbert will appear and be served and the judgment may go [141] against him. Of course, it is stipulated here that he has not yet been served with process but, non constat, he may be served prior to the trial of that action.

Reading that last portion: "that it is true that the said Robert Echols and Beverly Echols are entitled to recover damages in excess of $3,000.00, exclusive of in-

terest and costs, against any or all of the defendants named in their said action," should not that portion of that, the words "against any or all of the defendants named in their said action," be stricken and permit it to read, as it would then, "against the defendants named in (1) and (2) of this paragraph solely through the imputation to them of the negligence of Floyd Gilbert by operation of law"?

Mr. Stanbury: I think that is correct.

Mr. Sackett: In other words, the court suggests striking out "any or all of the defendants named in their said action"?

The Court: In lines 15 and 16, page 7, strike the comma and strike the words "against any or all of the defendants named in their said action" and the comma following that. Then it would read that they are entitled to recover "against the defendants named in (1) and (2) of this paragraph solely through the imputation to them of the negligence of Floyd Gilbert by operation of law."

Does that satisfy it?

Mr. Stanbury: Yes, sir. [142]

The Court: In paragraph XIV I would strike out of lines 26 and 28 the clause: "the Court finds that the said policy of the plaintiff also provides coverage as set forth in paragraph XVIII of these findings;".

Unless there is some special reason, I do not see the necessity for the inclusion of that clause at that juncture.

Mr. Stanbury: Does your Honor at this time object to the Finding XVIII, or merely referring to it at this place?

The Court: I do not see any reason to refer to it at this place, and we will take up Finding XVIII when we come to it.

Mr. Stanbury: Just so as to guard against inconsistent findings, that was all. I might say that if these findings were inconsistent, that in XIV it is intended to be all-inclusive and XVIII does something else. It would merely be a technical irregularity, if any. But I have had the misfortune of going to Washington, D. C. to lose a judgment because of alleged inconsistent findings, and that is what makes me hyper-cautious now.

The Court: Cannot that be covered by inserting after "policy" in line 25, "among other things"?

Mr. Stanbury: Yes. Before "all injuries," if the court please?

The Court: Yes. "covers, up to the limits of said policy, among other things, all injuries." [143]

Mr. Stanbury: Yes, sir; it does. And take out the clause: "the Court finds that the said policy of the plaintiff also provides coverage as set forth in paragraph XVIII of these Findings"?

The Court: Yes. Now, as so amended is paragraph XIV satisfactory?

Mr. Stanbury: Yes, sir.

The Court: Is there any objection to XV?

Mr. Sackett: I think, your Honor, again, I had a note on that which I think has already been answered. It was a question of whether the Finding went further than the court's decision, and I believe you have resolved that discussion on the other Finding.

The Court: Should we, in line 30 on page 7, in describing the Ohio Casualty's policy, just to be consistent, say "covers, among other things, the liability"?

Mr. Stanbury: That is certainly proper if it does cover anything else. I am unaware of anything else it does cover, technically, because it does not cover Gilbert and it does not cover Page as doing business as Mission.

So I do not know what else it would refer to. I think the Ohio insures only McKeon and Page doing business as Pacific Linen and Supply Company.

Mr. Sackett: For the purposes of this controversy, I think that is correct. Of course, the policy itself does have [144] this extended coverage provision. It could be anybody, just so it was an "owned vehicle."

Mr. Stanbury: That is correct, but there is no one answering that description in the findings of the court that I know of.

The Court: Well, if you are both satisfied, we will pass on.

Is there anything in XV that anyone objects to?

Mr. Sackett: We have no objection to XV, except we believe that our Finding XIII should be added:

> "That the Defendant, Floyd Gilbert, was not served with process in said San Luis Obispo County action for damages and, at the time of the trial of this cause, was not within the State of California."

The Court: Well, he might be served before the San Luis Obispo County action is tried, might he not?

Mr. Sackett: Yes.

The Court: How is it material?

Mr. Sackett: There is that possibility.

The Court: How is it material? I am not going to attempt to assume in this action that there has been a judgment against Floyd Gilbert, because there has not been according to the facts brought here, and apparently there is little likelihood that there will be in that San Luis Obispo action. There may be later in some other action. Does that [145] meet your objection?

Mr. Sackett: I believe it does, your Honor.

The Court: In Paragraph XVI I would strike the line 13 after "George B. Page individually" strike the "and/"—"individually or doing business".

Mr. Stanbury: Yes, sir.

The Court: And in line 17, after the name of "The Ohio Casualty Insurance Company," I would put a period and strike "within the meaning of said policy and the endorsement thereto set forth in paragraphs VII and VIII of these Findings."

Mr. Stanbury: Yes, sir.

The Court: Is there any other suggestions with respect to paragraph XVI?

Mr. Sackett: We would have no further.

The Court: Paragraph XVII, I would strike at the end of the paragraph the words "the Court finds that it is admitted and stipulated by the aforesaid plaintiff that the said Floyd Gilbert was an assured under its policy at the time of said accident."

Mr. Stanbury: Yes.

The Court: The record shows that.

Mr. Stanbury: That is right.

The Court: I do not believe it has a proper place here.

Mr. Stanbury: I agree with you.

The Court: Is there any other suggestion with respect [146] to Finding XVII?

Mr. Sackett: None, your Honor.

The Court: Or XVIII?

Mr. Sackett: None. your Honor, as to that.

The Court: XIX, I would strike those two "and/" before the "or".

Mr. Stanbury: Just "or"?

The Court: Just "or". Doesn't that serve the purpose?

Mr. Stanbury: Yes, sir; completely.

The Court: Is there any objection to Finding XIX?

Mr. Sackett: No objection.

The Court: Finding XX, I would strike line 30 after the name of the Ohio Company, the words: "and within the exclusion of the endorsement thereto contained in paragraph VII of these findings;".

Mr. Stanbury: Yes, sir.

The Court: And at the end of the paragraph, the words "and were activities within the meaning of the excluding endorsement set forth in paragraph VII of these Findings."

Mr. Stanbury: Yes, sir.

The Court: Is there any objection to XX?

Mr. Sackett: No. That has been covered by the court.

The Court: Paragraph XXI. I have put a period after "Exchange" at the end of line 23, and strike the words: "and that said endorsements do not affect the rights or liabilities [147] of any of the parties with respect to the accident in question."

Not that that would be improper, but it seems to me that is a conclusion of law and is not proper there.

Paragraph XXII, any suggestions with respect to it?

Mr. Sackett: No, your Honor.

The Court: Now, in the Conclusion of Law, paragraph I, line 9 refers to the San Luis Obispo County "action entitled". It seems to me that should be quoted.

Mr. Stanbury: Oh, yes.

The Court: The title.

Mr. Sackett: Quote starting with the name "Robert"?

The Court: With "Robert" and ending up with "Gilbert," apparently.

Mr. Stanbury: It is quoted. Shall I just put quotes around it? You want to put quotes around it?

The Court: Yes; I would put quotes around it.

Mr. Stanbury: Yes. Close the quote after "Gilbert,"?

The Court: After "Gilbert,".

With respect to paragraph II, should not the words in lines 24 and 25: "and subject to the provisions of paragraph III of these conclusions of law," be stricken?

Mr. Stanbury: Not unless we can agree that there will thereby be no conflict, your Honor, because there is joint insurance on Ohio's assured McKeon and Page, and the paragraph merely stating that Ohio owes that obligation may be found in- [148] consistent with the finding of joint liability; and that is the only reason that is in there, and I think it is important in this place.

The Court: Do you agree, Mr. Sackett?

Mr. Sackett: Yes; I do, your Honor.

The Court: Very well, it will stay.

Then Conclusion of Law III, page 12, at the end of it, should not this language of the conclusion commencing after the word "Company" in line 14 on page 12: "provided however that the combined payment by both plaintiff and defendant The Ohio Casualty Insurance Company shall not exceed the limits of said defendant's policy for $25,000.00 for death of or injury to one person and $50,000.00 for the entire accident."

Mr. Stanbury: What was the change there, your Honor?

The Court: I would strike that.

Mr. Stanbury: Oh, strike it?

The Court: Strike it entirely.

Mr. Stanbury: The only purpose for that—and the court has not expressed any opinion on it, so I don't know whether the court agrees or not—the Ohio policy says that it takes credit for any other insurance the assured has and it is not to provide anything but excess. We

know that when both policies say they are excess, that both policies have a claim to it. It does not follow necessarily that the [149] larger policy can say that we are not going to contribute to any insurance at all or give the assured more insurance than he would have under our policy.

The Court: Don't you have here both policies containing the same clause?

Mr. Stanbury: If they do have it. You say yours has it?

Mr. Sackett: Yes.

Mr. Stanbury: Theirs being the smallest one. Now, United policy says it is all excess; so does ours. I am not talking about that clause. And I do not think the United policy has this other clause where the Ohio policy says it will not pay. We should have the exact words here and it is in one of my memoranda. I think it is in the supplemental. It is in paragraph 4 under exclusions of the Ohio policy. It is Exhibit B, page 3; it reads as follows:—

The Court: "Other Insurance"?

Mr. Stanbury: Yes, sir; beginning with "provided,". It is an academic question, because this case up there in San Luis Obispo is not going to run into that sort of money; so I won't urge it strongly here at all.

The Court: I notice in United under "other insurance" it is almost verbatim.

Mr. Stanbury: Yes, sir.

The Court: I would assume that they would cancel each [150] other out.

Mr. Stanbury: They certainly cancel each other out as to the smaller limits; there is no doubt about that. But there is no reason why those upper limits could not apply, and it would be worth a vigorous argument if there were any chance of that happening. But it is not going

to happen, so I am not concerned to argue it for that reason.

The Court: Let us strike it, then.

Mr. Stanbury: All right.

Mr. Sackett: Striking out line 14?

The Court: Yes; beginning with "provided" to the end of line 18. Is there any objection to Conclusion of Law IV?

Mr. Sackett: No. No, your Honor.

The Court: With respect to Conclusions of Law V, VI, VII, and VIII why shouldn't they be stricken?

Mr. Stanbury: Well, No. V appears to be repetition of I.

The Court: Yes.

Mr. Stanbury: It is Gilbert. Let's see. There is no reference to Gilbert, your Honor, in Conclusion I. The only place where there is any reference to an obligation of Gilbert is in line 8 of page 11.

The Court: In I.

Mr. Stanbury: But only referred to as a party. [151]

Mr. Sackett: He is obligated under the contract naming both Page and Gilbert.

The Court: Just prior to "entitled", three words prior to "entitled".

Mr. Stanbury: Yes. And "to respond", down at the bottom, "to respond to and satisfy any judgment which might be rendered * * *". It is covered.

The Court: So V can go out.

Mr. Stanbury: V is repetitious.

The Court: Very well, let us strike it.

Mr. Sackett: Strike V out.

The Court: V will be stricken. VI is not necessary, is it?

Mr. Stanbury: Well, only if they should dismiss up there and file a new action and contend that the court has only adjudicated this one action.

As I see it, it does not harm anybody, your Honor, and it would avoid—

The Court: I take it it would meet the situation if you used Conclusion of Law VI and struck "or any other person, firm or corporation", because it would not be a binding adjudication upon them, anyhow?

Mr. Stanbury: No.

The Court: Do you agree to strike "or any other person, firm or corporation"? [152]

Mr. Stanbury: Yes, sir.

The Court: Then that will be stricken, and otherwise Conclusion VI will stand.

Mr. Stanbury: Yes, sir. The reason, your Honor, that Finding VII is suggested here—

The Court: That is Conclusion of Law VII?

Mr. Stanbury: Conclusion of Law VII, is because the parties came before this court to have their rights adjudicated, and the court will recall that when it came time to consider their relations to Gilbert we stipulated. It was an afternoon recess. We came back in and Mr. Brown said that we would stipulate to the court making a disposition as to the rights and liabilities of Gilbert.

The Court: Yes, Mr. Stanbury. I have done that, but when I find that Gilbert is an additional assured of the plaintiff's policy and is not an additional assured of Ohio's policy, any number of legal consequences may flow from that finding. It seems to me that that is as far as I can go in this action.

Mr. Stanbury: Perhaps so, your Honor.

The Court: Even if you stipulated that I might make a declaration to the effect of the plaintiff's obligations

upon further contingencies, those contingencies have not come to pass, and if there is any controversy from that, it has not been litigated here and I doubt if it is a matter [153] which can be adjudicated now.

Mr. Stanbury: I think that on VII the only reason for VII was to remove argument in the future about what these conclusions mean. It is true that it follows clearly as an operation of law from the previous conclusions what the rights of the parties are; but it was designed to avoid argument.

Now, the real argument, as I see it, is on Conclusion VIII, and that is the one where I acknowledge argument, that is, that there is where the argument existed as far as I can see in this whole proceeding. And the reason for suggesting that eighth conclusion, your Honor, was simply this—and it is a very important consideration—the Ohio Casualty Company and the United Pacific are before this court for a declaration of their rights, and they stipulate—

The Court: With respect to that San Luis Obispo action.

Mr. Stanbury: We did not ask for it. The plaintiff asked for it, an adjudication of their rights, and certainly that is broad enough to cover this situation.

To hold the matter of the pleading in abeyance for a moment, your Honor, the parties here stipulated that Gilbert caused this accident, he is liable. We stipulated that the court may decide where the insurance lies and the court has [154] made a finding. There is nothing else to be done between these two companies. We can go to Nebraska and sue Gilbert but, with what object?

Gilbert, if we try to collect from Gilbert, that is very true we have to get a judgment against Gilbert, but in

attempting to collect from the United Pacific with what object do we go. It would only be for the benefit of United Pacific, to prove what they admit right here in writing in this court.

The Court: Let us dispose of VII first.

Mr. Stanbury: Yes, sir.

The Court: Are you ready to strike VII?

Mr. Stanbury: Well, your Honor, I would stipulate to strike VII if VIII is left in, but if VIII goes out, then I want to be heard some more on VII.

The Court: They duplicate each other, do they not?

Mr. Stanbury: They do; yes.

The Court: Well, let us dispose of VII by striking it out, because VIII is larger than VII.

Mr. Stanbury: That is all right; yes.

The Court: Let us discuss VIII. I am just wondering whether that is a justiciable controversy at this time, what the rights of the plaintiff and Ohio Casualty might be in the event at some future time there should be a judgment against Floyd Gilbert. [155]

Mr. Stanbury: Now, let us cover what will happen if we get a judgment against Gilbert. My point is that where everything is stipulated to as between the parties who stipulate, it is an idle thing to go to Nebraska and prove what is admitted, for the benefit of the United Pacific.

Between the United Pacific and the Ohio we are in court asking the court to decide our rights, and the Ohio is about to advance some money to contribute to a settlement or help to satisfy a judgment with the United, which, by operation of law, the United is liable for if the liability of Gilbert is reduced to judgment.

The Court: But McKeon and Page doing business as Pacific Laundry and Dry Cleaners are not here.

Mr. Stanbury: This conclusion might have to be whittled down to take them out, your Honor. Let us assume that it is rewritten to take them out and that the court goes no further than the parties that appeared in their complaint and stipulated in court here that this court decide their rights, United and Ohio, what right is United being deprived of here?

They are deprived of the right of having a judgment obtained against their assured Gilbert, which is an idle act and an utter waste of time and money, because they stipulate to the liability of their assured right here. So how is anything added by a judgment in Nebraska or anywhere else? [156]

I cited to your Honor a case, a Washington case, holding that it is not necessary to get a judgment against the assured in order to be entitled to recover under a policy if it is clearly established that the liability exists.

The Court: Yes; I recall the case.

Mr. Stanbury: This court could not adjudicate anything as to Gilbert nor as to McKeon and Page.

The Court: All right; let us take them out of there.

Mr. Stanbury: Yes.

The Court: Conclusion of Law VIII will read then, will it not, "That the plaintiff United Pacific Insurance Company alone insures the liability of Floyd Gilbert in connection with the said accident of January 16, 1946, and is obligated, within the cash limits of its policy,"—we do not need the "cash," do we?

Mr. Stanbury: No.

The Court: —"within the limits of its policy," strike "cash"—"to respond to and satisfy any judgment which may be rendered against Floyd Gilbert in connection with the said accident"—we strike the next clause, strike the next clause "and to pay, indemnify and reimburse any

claim which may be made against the said plaintiff United Pacific Insurance Company, as insurer of Floyd Gilbert, by R. H. McKeon and G. B. Page doing business as Pacific Laundry and Dry Cleaners or R. H. McKeon or G. B. Page [157] individually."

Where does that leave us?

Mr. Stanbury: If your Honor please, I would suggest not striking it but changing it to read as follows, going back to where your Honor suggested to strike, "and to pay".

The Court: Yes.

Mr. Stanbury: And permit it to read this way: "to pay, indemnify and reimburse any claim which may be made against the said plaintiff United Pacific Insurance Company, as insurer of Floyd Gilbert by"—dropping down—"defendant The Ohio Casualty Insurance Company for reimbursement of expenditures actually made or to be made * * * in satisfaction of judgment or in settlement of claims arising from said accident and specifically with regard to the claims of Robert Echols and Beverly Echols."

That disposes of the Echols' rights, except those parties that come in here and ask the court that the court declare their rights.

At a time when the decision of this court was not known to these people, both counsel said, "We stipulate that the court may decide this question of Gilbert and thus avoid the circuity of action which is perfectly ridiculous." The United Pacific, stipulating its assured's liability, is in no position to say, "You go to Nebraska and get a judgment and prove it," because they admit it right out here [158] in open court; they admit it in writing. And even in the old days, I believe that their admission would dispense with the condition precedent of a judg-

ment; but certainly in the spirit of the present times, where we look more to the substance than we used to, I respectfully submit, your Honor, that for the United Pacific to say that although we admit in these proceedings that our assured is liable, and although we have submitted it to a court to decide who insured this man, nevertheless, we have a right to make you go and find him and procure a judgment and thus prove to us your claim.

The Court: How can they bind him? That is what is bothering me.

Mr. Stanbury: They can't, your Honor.

The Court: If they paid out for his account, they might have a claim against him for reimbursement.

Mr. Stanbury: Not as his insurer. An insurer can't get the money back from the insured.

The Court: No. Your answer to that is, of course, that there is no action over.

Mr. Stanbury: No, sir.

The Court: Against the principal, or, rather, against the assured here, Gilbert.

Mr. Stanbury: Yes, sir. In fact, I will tell you what I think of this point, your Honor. I would be willing [159] to have Mr. Sackett argue it for me. If Mr. Sackett can tell your Honor in what respect United Pacific gains anything or what right they have to say: "Although we admit our assured's liability, you must get a judgment against him to prove it to us," if he can advance any reason that sounds compelling, I think it is more convincing than hearing me argue the contrary. I don't think it can be done.

The Court: What do you say, Mr. Sackett?

Mr. Sackett: Well, we feel in regard to both VII and VIII—of course, VII is out—but VIII goes to the subrogation theory of the defendant Ohio Casualty, and this

attempts to make a finding by this court as to what the rights might be in the future, what might be done in the future.

I will admit that we have stipulated that the negligence of Gilbert is what brought this about. There has been a finding that Gilbert is the sole assured of the United Pacific and not of the Ohio.

The Court: Can there be any question but what the legal consequences, as Mr. Stanbury claims, will follow if the court's construction here is correct?

Mr. Sackett: I do not say that there is. In fact, the court finds that the Ohio does not insure Gilbert; that the United does insure Gilbert. All right. The legal effect of that is what? They can proceed to subrogate against [160] their employee Gilbert.

The Court: Is there any reason why this court cannot adjudicate that result, the plaintiff here having sought the equitable remedy and a court of equity being always inclined, once it takes jurisdiction, to resolve the entire controversy?

Mr. Sackett: We feel, while the objection was raised to that, or, rather, not an objection—it was left out of the findings we proposed because the court had not pronounced that as its decision on July 11th. This verifies it, and if the court does make that as a part of the decision, I personally can see no objection to that being done.

The Court: Of course, what I announced on July 11th was legally what the court intends to do.

Mr. Sackett: I appreciate that, your Honor.

The Court: The formalities have to be taken care of. I always find that a great many things, as a rule, we think of when we come to settling the final judgment that may

not have been anticipated as a matter of detail at the time of the decision.

Mr. Sackett: To be honest and frank with the court—

The Court: I have been inclined to agree, but I am impressed with this fact: The plaintiff here sought the remedy, invoked the equitable jurisdiction of this court, with the consequences that I have just adverted to; and the [161] fact that the plaintiff has stipulated that the negligence of its assured was the sole proximate cause of this accident. There is no question, as has been pointed out here, of any possible claim over for reimbursement against the assured; so there is no reason why the plaintiff could not stipulate facts comprising the condition precedent to liability under its policy, and having done so, should not this court of equity clean up the controversy, button it up, in the language of the street?

Mr. Sackett: I can advance no argument, your Honor, against what the court has stated. And, as I wanted to state to the court, these matters were sent immediately up to Mr. Brown who has carried the laboring oar in this case—I have been more or less the Los Angeles go-between, you might say—and he did not think that was necessary, and we could work it out as we have.

The Court: If I am in error and you take an appeal, why, perhaps the entire matter can be corrected. But I believe that the Federal Court, having the very broad equitable jurisdiction—as broad as the courts of chancery had at the time of the Revolution—that we are a little bit too niggardly sometimes in the exercise of it and leave controversies hanging that should not have been left hanging.

I am glad to have this argument impressed upon me for that reason. I think that it should be adopted, and then the [162] matter is closed one way or the other when it

becomes final. So let us amend Conclusion of Law No. VIII to read as follows:

> "That the plaintiff United Pacific Insurance Company insures the liability of Floyd Gilbert in connection with the said accident of January 16, 1946, and is obligated, within the limits of its policy, to respond to and satisfy any judgment which may be rendered against Floyd Gilbert in connection with the said accident and to pay and reimburse any claim which may be made against the said plaintiff United Pacific Insurance Company, as insurer of Floyd Gilbert, by defendant The Ohio Casualty Insurance Company for reimbursement of expenditures"—

instead of

> "actually made"—
> "reasonably and necessarily made or to be made by The Ohio Casualty Insurance Company in satisfaction of any judgment."

Well, I am somewhat in doubt about that language there at the present time.

Mr. Stanbury: I think that we should limit it to Robert Echols and Beverly Echols.

The Court: Yes; any final judgment which might be rendered in favor of Robert Echols and Beverly Echols or [163] either of them for damages proximately resulting from the aforementioned accident of January 16, 1946. Will that cover it?

Mr. Stanbury: I am writing. I have something to say, your Honor. If another judgment is rendered up there, if we settle it, as we will, and the action is going to be settled—in fact, the price is agreed on—there is no objection to telling the court it is settled?

Mr. Sackett: No.

Mr. Stanbury: That case is settled for $10,250. It has not gone through yet. Under the court's order we shall pay out $5,125 as one of the insurers of this employer.

The Court: You can cover that by stipulating the judgment.

Mr. Stanbury: We were trying to avoid that by not having to go up to San Luis Obispo and doing that. That is what we were going to do, and we decided not to do it. Now, if this finding is put in it, the United Pacific would be very foolish if they did not say, "Well, we won't do it by stipulated judgment, because by that way we avoid the spirit of the court's fourth and fifth conclusions." I won't say they will do it.

The Court: How could I do any more? I could not conclude that United Pacific would be responsible for more if the Ohio just wanted to generously go out and settle. [164]

Mr. Stanbury: Except "reasonable and necessary." It puts us on proof. If we sue the United Pacific, we have to show it was reasonable and necessary. The reason I put in "actually made" before was that I thought it covered the same thing.

The Court: I think it can be worded much better than we are wording it now.

Mr. Stanbury: Yes, sir.

The Court: If you will rephrase that so that it is clearly qualified and it is all expenditures made in the way of settlement of the claim, those which are reasonably and necessarily made, the same as you would have in a reinsurance agreement application.

Mr. Stanbury: If the court is satisfied with the words "reasonably and necessarily"—

The Court: "made or to be made by The Ohio Company."

Mr. Stanbury: Yes, sir; "in satisfaction"—

The Court: Let us put it "in settlement".

Mr. Stanbury: May I make this suggestion, your Honor: That we go exactly as the court has dictated it down to that point, which will read: "by defendant The Ohio Casualty Insurance Company for reimbursement of expenditures reasonably and necessarily made or to be made by the Ohio Casualty Insurance Company in satisfaction of any final judgment which may be rendered in favor of Robert Echols [165] and Beverly Echols or either of them for damages proximately resulting from the aforementioned accident of January 16, 1946, or in reimbursement or in settlement of the claims of the said Robert Echols and Beverly Echols reasonably and necessarily made by the said Ohio Casualty Insurance Company."

The Court: How is it going to read now?

Mr. Stanbury: "or in settlement of any claims of said Robert Echols or Beverly Echols."

The Court: Wouldn't you think it better, if you are going to repeat it, to put a comma and "for reimbursement of expenditures reasonably and necessarily made or to be made by The Ohio Casualty Insurance Company either (1) in satisfaction of judgment, or (2) in compromise settlement of the claims of Robert Echols and Beverly Echols or either of them arising from said accident"?

Mr. Stanbury: Yes, your Honor.

The Court: You can no doubt improve upon that.

Mr. Stanbury: Anyway, I have the exact idea. I was using editorial license here for that same thought.

The Court: There is always editorial license to improve it.

Mr. Stanbury: Yes, sir.

The Court: I think the paragraph V of the judgment proposed by the United here and directing action in accordance with the declarations here would be in order, would be an [166] appropriate last paragraph to the judgment.

Mr. Sackett: I thought I had a copy of the judgment.

Mr. Stanbury: That is all right. It is in your conclusion, isn't it?

Mr. Sackett: No; not the direction.

The Court: Do you have a copy?

Mr. Sackett: I do not have one with me.

The Court: Here is a copy. The clerk will hand you one. That will require some editorial revamping, but it seems to me it would be in order as a last paragraph of the judgment for the court to direct the parties to act in accordance with the declarations which they sought.

Mr. Stanbury: Yes, sir.

The Court: Will you revise these findings and judgment?

Mr. Stanbury: Yes, sir.

The Court: And submit them? Can you have them here by day after tomorrow?

Mr. Stanbury: I can do it and will do it; yes, sir.

The Court: Will you submit them to Mr. Sackett?

Mr. Stanbury: Yes; I will.

The Court: And will you endorse your approval or notify the clerk promptly if you have any objections, Mr. Sackett?

Mr. Sackett: I certainly will, your Honor.

The Court: Does that cover it, gentlemen?

Mr. Stanbury: Yes, your Honor.

Los Angeles, California, Friday, July 11, 1947.
1:30 P. M.

The Court: I recall very distinctly where the argument left off, gentlemen. Is Mr. Brown not here?

Mr. Sackett: Mr. Brown is not here. He is in Portland.

The Court: I am sorry Mr. Brown is not here, because I wanted to discuss with him certain phases of this matter, but they have already been discussed.

Mr. Sackett: If counsel is agreeable that this matter be continued for a short time for further hearing, I will have Mr. Brown down here.

The Court: It will not be necessary. I am clear on the matter in my own mind. The arguments have all been very helpful to me.

It seems to me that, despite all the reasons advanced by court and counsel at the last hearing as to why Gilbert should be insured within the meaning of the policy, that result has not been reached without doing violence to the language of the policy. There were times during the argument when I thought it could be. I am clear now in my own mind, that to treat Gilbert as insured under The Ohio Casualty policy would require treating everyone who drove an automobile or vehicle registered in the name of Page, with Page's consent, as an additional insurance policy, and the result would be that Page might be doing business under several different names, as, for example, [2] in the cleaning and dyeing business, the Mission Linen and Towel Supply Company, and Pacific Laundry and Dry Cleaners. He was doing business under several different firm names.

The Ohio Casualty policy expressly states with respect to automobiles owned and registered in the name of the

named insured. In my opinion the name Pacific Laundry and Dry Cleaners must be read as a part of the named insured. To say otherwise you would reach the result that as to any vehicle owned by Page, registered in the name of Page, and being used with his consent, the person driving the vehicle would be the named insured, within the meaning of The Ohio Casualty policy.

I am convinced now, as Mr. Stanbury so vigorously urged at the last argument, that The Ohio Casualty policy is not as broad as the United Pacific policy.

I therefore find, with respect to the accident referred to in the complaint, as the accident of January 16, 1946, that both policies apply to and cover that accident; that is, the policy of The Ohio Casualty Insurance Company and the policy of the United Pacific Insurance Company.

I further find that both insurers are bound and obligated to provide a defense to action numbered 15733 now pending in the Superior Court of the State of California in and for the County of San Luis Obispo, as described in the complaint, and that both insurers, United Pacific Insurance Company and The Ohio Casualty Insurance Company, are bound to respond, under [3] their policies, for such judgment as may be rendered in that action against R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners, and George B. Page, doing business individually under the fictitious name of Mission Linen and Towel Supply Company.

I further find that the plaintiff, United Pacific Insurance Company, a corporation, does insure the driver of the vehicle, Floyd Gilbert, and that Floyd Gilbert is assured within the meaning of the United Pacific policy, but that Floyd Gilbert is not covered, and is not an assured within

the meaning of the policy of The Ohio Casualty Insurance Company.

Does that cover the matter, gentlemen?

Mr. Stanbury: There is one issue, your Honor, that is not covered; that is, as to the San Luis Obispo situation, your Honor has made no announcement of the finding as to prorating of that liability.

The Court: They are both insured. They are equally liable to provide a defense in that action, and to respond, as stated within the limits of their policy for the judgment which may be rendered in that action.

Counsel for the plaintiff will prepare findings of fact and conclusions of law and judgment embodying the ruling. How soon can those be prepared, Mr. Sackett?

Mr. Sackett: What would be the length of time the court would require? I am pretty much tied up. [4]

The Court: Mr. Stanbury, can you prepare them right away?

Mr. Stanbury: I am also tied up, but I can do it. I believe I can dictate them tomorrow morning.

The Court: We will say within five days?

Mr. Stanbury: Yes.

The Court: Very well. Counsel for The Ohio Casualty Company will prepare findings of fact and conclusions of law and judgment, and settle them under Rule VII, within five days.

[Endorsed]: Filed Nov. 6, 1947. Edmund L. Smith, Clerk. [5]

[Endorsed]: No. 11799. United States Circuit Court of Appeals for the Ninth Circuit. United Pacific Insurance Company, a corporation, Appellant, vs. The Ohio Casualty Insurance Company, a corporation, R. H. McKeon, individually, George B. Page, individually, R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners; George B. Page, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company; Floyd Gilbert, Robert Echols and Beverly Echols, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 28, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

In the United States Circuit Court of Appeals
Ninth Circuit

Case No. 11799

UNITED PACIFIC INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a corporation, et al.,

Defendants.

ADOPTION OF STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY ON APPEAL

Comes now the Appellant in the above entitled cause and hereby adopts for its points upon which it will rely on appeal, the Statement of Points appearing in the transcript of the record.

HARRY E. SACKETT
RAYMOND G. BROWN
Attorneys for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 5, 1948. Paul P. O'Brien, Clerk.